Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-850

UNITED STATES OF AMERICA,

Petitioner,

—v.—

RICHARD J. MARA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

[1] The opinion and the judgment of the court of appeals, the district court order of September 28, 1971 directing Mara to furnish the exemplars, and the order of judgment and commitment holding Mara in contempt and directing that he be committed to the custody of the United States Marshall were printed at pp. 18-21 of the appendix to the petition for a writ of certiorari. The sealed affidavit of F.B.I. agent William Buchanan has been forwarded to the Court; respondent has not seen it.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Sept. 28, 1971	**Filed Government's Petition for court order directing Richard J. Mara, also known as Richard J. Marasovich, to furnish exemplars of his handwriting and printing before and to the September 1971 Grand Jury.**
Sept. 28, 1971	**Enter order directing Richard J. Mara to furnish to Grand Jury such exemplars of his handwriting as Grand Jury deems necessary. DRAFT**
	Order affidavit of William Buchanan impounded until further order of court—Robson, J.
Sept. 28, 1971	Issued 2 certified copies order to U.S. Marshal.
Sept. 28, 1971	Filed Affidavit of William L. Buchanan (impounded—in vault).
Sept. 28, 1971	Order respondent Richard J. Mara in direct and continuing contempt of court for failure to obey order of Sept. 28, 1971 and order said respondent committed to custody of the U.S. Marshal until such time as said order is obeyed—DRAFT—Robson, J.
Sept. 28, 1971	Issued 2 certified copies order to U.S. Marshal
Oct. 8, 1971	Filed Notice and Petition to stay order and set bail.
Oct. 8, 1971	Petition for a stay order and setting of a bond is heard and is denied—Robson, J.
Oct. 13, 1971	Filed Notice of Appeal of Richard J. Mara
Oct. 13, 1971	Filed Designation of Record on Appeal.

DATE	PROCEEDINGS
Nov. 12, 1971	Certified and transmitted record on appeal U.S.C.A.
Dec. 2, 1971	Filed Opinion of U.S.C.A. (71-1740).
Dec. 2, 1971	Filed Mandate of U.S.C.A.
Dec. 2, 1971	Records returned from U.S.C.A.
Dec. 28, 1971	Filed Request of U.S. Attorney for entire record on appeal be transmitted to Clerk of Supreme Court, Washington, D. C.
Dec. 27, 1971	Enter order for leave to withdraw record for use in preparing Government's Petition for Writ of Certiorari to be filed in the Supreme Court—Austin, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Docketed]

No. 71 GJ 4060

[Filed Sep. 28, 1971, M. Stuart Cunningham, Clerk]

IN RE: RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, a witness before the September 1971 Grand Jury

GOVERNMENT'S PETITION FOR COURT ORDER DIRECTING RICHARD J. MARA, ALSO KNOWN AS, RICHARD J. MARASOVICH, TO FURNISH EXEMPLARS OF HIS HANDWRITING AND PRINTING BEFORE AND TO THE SEPTEMBER 1971 GRAND JURY

The United States of America by WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois petitions the court for an order directing respondent, Richard J. Mara, also known as, Richard J. Marasovich, to furnish before and to the September 1971 Grand Jury of the United States District Court for the Northern District of Illinois, Eastern Division, such exemplars of respondent's handwriting and printing as the said Grand Jury deems necessary, and in support thereof states the following:

1. The September 1971 Grand Jury for the Northern District of Illinois, Eastern Division, is now conducting an investigation of alleged illegal activities in said District; said investigation involves possible violations of Title 18, United States Code, Sections 371 and 659. Richard J. Mara, also known as, Richard J. Marasovich, has been subpoenaed by said Grand Jury and fully advised that he is a potential defendant in its investigation.

2. It is essential and necessary to the aforesaid Grand Jury investigation that Richard J. Mara, also known as,

Richard J. Marasovich, furnish before and to the said Grand Jury exemplars of his handwriting and printing. Such examplars will be used solely as a standard of comparison in order to determine whether the witness is the author of certain writings.

3. Respondent, Richard J. Mara, also known as Richard J. Marasovich, appeared pursuant to subpoena before the September 1971 Grand Jury on September 23, 1971. At that time the respondent was directed by the foreman of the Grand Jury to furnish handwriting exemplars out of the presence of the Grand Jury, under the supervision of the Grand Jury's duly designated agents. The respondent refused, asserting constitutional privilege.

4. Respondent, Richard J. Mara, also known as, Richard J. Marasovich, was then directed by the foreman of the Grand Jury to return and appear before the Grand Jury at 9:30 a.m. on September 28, 1971. At that time the respondent was again directed by the foreman to furnish handwriting exemplars in the same manner that he had been directed earlier. The respondent again refused, and again asserted constitutional privilege.

5. The government, petitioner in this matter, contends that mere handwriting and printing exemplars are identifying physical characteristics outside the protection of the Fifth Amendment. Petitioner further contends that respondent has no constitutional privilege whatsoever to refuse to furnish exemplars of his handwriting and printing as demanded by the Grand Jury. *Gilbert* v. *California*, 388 U.S. 263, 265-67 (1967); *Schnerber* v. *California*, 384 U.S. 757-61, 64 (1966); *United States* v. *Doe*, 405 F.2d 436, 437-38 (2nd Cir. 1968).

6. Moreover, for reasons stated in the affidavits submitted to this court for in camera inspection, the exemplars sought do not constitute an unreasonable seizure under Fourth Amendment standards. See: *In Re Dionisio*, 442 F.2d 276, 80 (7th Cir. 1971).

WHEREFORE, petitioner prays that this court enter an order directing the respondent Richard J. Mara, also known as Richard J. Marasovich to furnish before and to the September 1971 Grand Jury of the United States District Court for the Northern District of Illinois, Eastern Division, such exemplars of respondent's handwriting and printing as the Grand Jury deems necessary.

Respectfully submitted,

/s/ William J. Bauer
WILLIAM J. BAUER

MAL:pmh

September 28, 1971
Pages 1 to 9.

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 GJ 4060

[Received Jun. 27, 1:38 p.m., '72, United States Attorney, Northern District, Chicago, Illinois]

IN RE: RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, a witness before the September 1971 Grand Jury

TRANSCRIPT OF PROCEEDINGS
Before
HON. EDWIN A. ROBSON
Judge

CLAUDE W. YOUKER, JR.
Official Court Reporter
U. S. District Court
United States Court House
Room 2544-A
Chicago, Illinois 60604
312-427-4393

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 GJ 4060

IN RE: RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, a witness before the September 1971 Grand Jury

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the Honorable EDWIN A. ROBSON, Chief Judge of said Court, in his courtroom at the United States Courthouse, Chicago, Illinois, on Tuesday, September 28, 1971, at the hour of 3:00 o'clock p.m.

PRESENT:

HON. WM. J. BAUER, U. S. Attorney, by
MR. MATHIAS A. LYDON,
Asst. U.S. Attorney,

on behalf of the Petitioner;

MR. ANGELO RUGGIERO,
(134 North LaSalle Street, Room 1400,
Chicago, Illinois 60602),

on behalf of the Respondent.

[fol. 2] (The Court gave attention to other matters on the call, after which the following proceedings were had herein, to-wit:)

THE CLERK: 71 Grand Jury 4060, in re Richard J. Mara, a/k/a Richard J. Marasovich, a witness before the September 1971 Grand Jury, Government's Petition for Court Order directing Richard J. Mara, a/k/a Richard J. Marasovich, to furnish exemplars of his handwriting and printing before and to the September 1971 Grand Jury.

THE COURT: Good afternoon, counsel.

Is the respondent present?

MR. LYDON: Good afternoon, your Honor.

THE COURT: Are you appearing as counsel for the respondent?

MR. RUGGIERO: My name is Angelo Ruggiero for the record. I am appearing as counsel for the respondent.

THE COURT: All right. Is the Government ready to proceed?

MR. LYDON: Yes, your Honor. Our motion is a petition seeking a Court Order directing the respondent, Richard J. Mara, a/k/a Richard J. Marasovich, to submit himself for the purpose of obtaining handwriting and [fol. 3] printing exemplars as is more fully set forth in our affidavit which was submitted for the Court's in camera inspection under the standard setup in re Dionisio.

We have a reasonable basis for requesting this information. It does not constitute an unreasonable seizure under the Fourth Amendment standards. In addition, of course, it has no Fifth Amendment privilege as has been established in the Supreme Court case of United States v. Gilbert.

THE COURT: All right. For the purpose of the record, the Court has examined the affidavit which was submitted in camera. It has examined the petition that the Court has before it.

Do you have anything to say on behalf of the respondent?

MR. RUGGIERO: I have not seen the petition, your Honor.

MR. LYDON: Your Honor, I have a copy of the order here. The affidavit was submitted for in camera inspection only.

THE COURT: Yes; I am talking about the petition. Have you seen the petition?

MR. RUGGIERO: No, I have not, your Honor. I [fol. 4] have no documents at all.

THE COURT: Well, you certainly are entitled to examine the petition.

MR. LYDON: Your Honor, copies of the petition have not been—

THE COURT: Will you also sign the United States Attorney's name to the petition?

I will take a five-minute recess so counsel can have an opportunity to examine the petition.

MR. RUGGIERO: Thank you, your Honor.

THE COURT: Recess for five minutes.

(There was a short recess, after which the following further proceedings were had herein, to-wit:)

THE CLERK: 71 Grand Jury 4060, in re Richard J. Mara, et cetera, petition for order directing respondent to furnish exemplars of his handwriting, et cetera.

THE COURT: Have you had an opportunity to examine the petition of the Government?

MR. RUGGIERO: I have, your Honor.

THE COURT: Do you have anything to say for and on behalf of the respondent?

MR. RUGGIERO: Yes, I do, your Honor. I believe that this petition as it is set forth is used solely as a [fol. 5] basis—as they state in Paragraph 2—solely as a standard of comparison in order to determine whether the witness is the author of certain writings and as such it comes clearly under the Dionisio case and also the case of United States v. Bailey, which was an opening rendered by Judge Will in this Court, under the Fourth Amendment as being unreasonable searches and seizures.

I mean, there is no probable cause here because, if there had been probable cause, your Honor, they would have indicted him and it is unreasonable because they seek to get information from him, incriminating evidence from him, where there has been no cause shown. If you just take the facts in United States v. Bailey, which I am sure the Court is aware of, where they wanted to take handwriting exemplars such as they do in this case, what the Government really wanted was obviously handwriting samples to prove its case; and that's exactly what they are doing here.

Judge Will held that, of course, the Court shouldn't—

THE COURT: Well, I might say very emphatically that I disagree with Judge Will. I respect and I admire [fol. 6] him, but we have a difference of opinion on that.

MR. RUGGIERO: Well, of course, your Honor; but we can't, I think, cast aside Dionisio.

THE COURT: I have examined the Dionisio decision and also all the other decisions that are set forth herein. I have examined the affidavit that was filed in camera and the Court is of the opinion that the Government has the right to the handwriting exemplars, that it does not violate any of the constitutional rights that you contend that it violates; and the Court would direct that the respondent furnish handwriting exemplars.

Now, this comes before the September 1971 Grand Jury and if the respondent here fails to furnish the handwriting exemplars, the Court will have no alternative but to incarcerate him for being in contempt of court and that will be until he either furnishes the handwriting exemplars or until the term of this Grand Jury expires.

So, I would ask at this time whether the respondent intends to furnish the handwriting exemplars?

MR. RUGGIERO: My client has instructed me, your Honor, that he will not furnish the handwriting exemplars.

[fol. 7] THE COURT: Now, you understand, sir, that your refusal now constitutes contempt of Court and if you persist in that attitude, that the Court has no alternative but to sentence you for contempt, and that will be until you either furnish the handwriting exemplars or until the expiration of this Grand Jury.

Now, understanding that, do you still state that you will refuse to furnish handwriting exemplars?

MR. RUGGIERO: He understands that, your Honor.

THE COURT: You understand that and you still refuse to furnish the handwriting exemplars, do you?

THE RESPONDENT: Yes.

THE COURT: All right, state it so I can hear.

THE RESPONDENT: Yes.

THE COURT: All right, then, the Court will have no alternative but to hold you in contempt of Court and I will enter the order requiring the handwriting exem-

plars. I will order the respondent taken into custody and to be held in custody until he either furnishes handwriting exemplars or until the expiration of this Grand Jury.

Will the United States Attorney prepare the necessary order?

MR. LYDON: Yes, your Honor.

[fol. 8] MR. RUGGIERO: Your Honor, I might make a comment, your Honor, that, of course, this defendant has never seen that in camera affidavit so we do not know what is in that.

THE COURT: It is in camera and it will be impounded and you have the right to have that brought up before the Court of Appeals if necessary.

MR. RUGGIERO: Yes, your Honor, because we have no knowledge, obviously, of what is in there, whether it is reasonable or whether there is probable cause.

THE COURT: I understand. That may be stated and be a part of the record.

All right. Take the respondent into custody.

Are there any other matters to take up with the Court at this time?

MR. LYDON: No, your Honor.

THE COURT: All right. Thank you very much, ladies and gentlemen of the Grand Jury. You are excused.

(Which were all the proceedings had in the above-entitled matter on the day and date aforesaid.)

[fol. 9]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 GJ 4060

IN RE: RICHARD J. MARA, also known as
RICHARD J. MARASOVICH, a witness
before the September 1971 Grand Jury

CERTIFICATE

I HEREBY CERTIFY that the proceedings had in the above-entitled matters, before the HONORABLE EDWIN A. ROBSON, Chief Judge of said Court, on Tuesday, September 28, 1971, were reported stenographically under my direct personal supervision, and that the foregoing typewritten transcript, consisting of pages 1 to 8, inclusive, is a true, correct and complete transcript of those portions of the proceedings as were more particularly hereinbefore set forth.

CLAUDE W. YOUKER, JR.
Official Court Reporter
Northern District of Illinois
Eastern Division

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 GJ 4060

IN RE: RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, a witness before the September 1971 Grand Jury

PETITION TO STAY ORDER AND SET BAIL

Now comes Petitioner, RICHARD J. MARA, also known as RICHARD J. MARASOVICH, a witness before the September 1971 Grand Jury for the Northern District of Illinois, by his Attorney, ANGELO RUGGIERO, and respectfully represents unto this Honorable Court as follows:

1. That he has been subpoenaed by the 1971 Federal Grand Jury and has been advised that he is a potential defendant in its investigation.
2. That petitioner has been requested by said Grand Jury to furnish handwriting and printing exemplars out of the presence of the Grand Jury to the Federal Bureau of Investigation; that he has refused to furnish exemplars of his handwriting and printing; that his refusal on constitutional grounds resulted in the Government's Petition obtaining an order ordering him to furnish said handwriting and printing exemplars.
3. That on September 28, 1971, in accordance with the Government's Petition, RICHARD J. MARA, also known as RICHARD J. MARASOVICH, was held in contempt of Court and incarcerated for the life of the Grand Jury or until such time as he gives his handwriting and printing exemplars.
4. That the order holding RICHARD J. MARA, also known as RICHARD J. MARASOVICH, in contempt of this Honorable Court was based upon an Affidavit or Affidavits which the Court has inspected in camera and which Affidavit or Affidavits neither petitioner or his counsel have seen.

5. That the Petitioner refuses to furnish exemplars of his handwriting and printing on the basis that the order directing him to furnish said exemplars violates his constitutional rights under the Fourth Amendment of the Constitution of the United States, as to unreasonable searches and seizures, the Fifth Amendment of the Constitution of the United States, as to self incrimination and due process of law and the Sixth Amendment of the Constitution of the United States as to right of counsel.

6. That further to compell the witness to report directly to Government agents is without the purview of the functions of the Grand Jury.

7. That it is the intention of your petitioner to appeal the aforementioned orders directing him to furnish exemplars of handwriting and printing and judgment of commitment for contempt of Court, and petitioner appeals with the belief that he will prevail.

8. That this appeal is neither frivolous or taken for delay, and that the petitioner believes that he is entitled to his bond.

WHEREFORE, petitioner, RICHARD J. MARA, also known as RICHARD J. MARASOVICH, prays that the judgment of commitment be stayed and that bond be set pending the appeal of the order of commitment heretofore entered by this Honorable Court.

/s/ Richard J. Mara
RICHARD J. MARA
Also known as
RICHARD J. MARASOVICH
Petitioner

ANGELO RUGGIERO
Attorney for Petitioner
134 North LaSalle Street
Chicago, Illinois 60602
AN 3-6073

STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

RICHARD J. MARA, also known as RICHARD J. MARASOVICH, being first duly sworn on oath, deposes and says that he is the Petitioner herein; that he has read the above and foregoing Petition by him subscribed and that the same is true and correct.

/s/ Richard J. Mara

Subscribed and Sworn to before me
this 7th day of October, A.D., 1971.

/s/ [Illegible]
Notary Public

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. ———

RE: RICHARD J. MARA, also known as,
RICHARD J. MARASOVICH, a witness before
the September 1971 Grand Jury

EMERGENCY MOTION FOR A STAY OF COMMITMENT
AND FOR BOND PENDING APPEAL

Now comes the witness-appellant, RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, by his Attorney, ANGELO RUGGIERO, and moves this Honorable Court for a stay order of commitment heretofore entered by the District Court, and for bond pending appeal from the orders entered by the District Court, and in support thereof, states as follows:

1. That the witness is under subpoena to appear before the September 1971 Grand Jury, presently sitting in the Northern District of Illinois.

2. That on September 23, 1971, and September 28, 1971, the witness appeared before the said Grand Jury. Upon appearing before the said Grand Jury, the witness refused to give handwriting and printing exemplars to Government Agents, and did so on the ground of constitutional privilege under the Fourth, Fifth and Sixth Amendments of the United States Constitution, and on the further ground that compelling the witness to report directly to government agents is without the purview of the function of the Grand Jury.

3. That on September 28, 1971, the Government filed a petition with the District Court for an order directing the witness to furnish exemplars of his handwriting and printing before the 1971 Grand Jury, a copy of the Petition which is hereto attached as Exhibit I.

4. That the Government's Petition was based upon Affidavits submitted to the District Court for in camera inspection, the contents of said Affidavits not being known to the witness nor his counsel.

5. That on September 28, 1971, the Court entered an order directing the witness to submit his handwriting and printing exemplars to the 1971 Grand Jury, a copy of the order which is hereto attached and made a part hereof as Exhibit II.

6. That on September 28, 1971, the Court entered an order of judgment and commitment, a copy of the order which is hereto attached and made a part hereof as Exhibit III, committing the witness to the custody of the United States Marshal for the Northern District of Illinois, for contempt of court until such time as the witness shall obey the order heretofore entered directing him to furnish his handwriting and printing exemplars.

7. That the District Court refused to stay the order of commitment and refused to set bond, a copy of the order which is hereto attached and made a part hereof as Exhibit IV.

8. That bond was sought under the following statute: Title III-Recalcitrant witnesses, Section 301, which amends Title 28 United States Code, Section 1826.

9. That the issues raised on appeal are not frivolous nor are they raised for purposes of delay.

10. That important issues of a constitutional nature reaching the Fourth, Fifth and Sixth Amendments of the United States Constitution and the powers of a Grand Jury are involved in this appeal.

11. That in considering whether to grant bond in this matter, the Court is respectfully requested to consider the following:

(a) That the government seeks handwriting and printing exemplars from the witness based upon Affidavits which have been submitted to the lower Court for its inspection in camera, the contents of which are unknown to witness or his counsel;

(b) That a subpoena to appear before a Grand Jury is within the province of the Fourth Amendment and that Courts have struck down Grand Jury subpoenas which are unreasonable under the Fourth Amendment of the United States Constitution;

(c) That compelling a person to furnish handwriting and printing exemplars is as much within the scope of the Fourth Amendment as is compelling him to produce his books and papers;

(d) That the exemplars herein are sought solely as a standard of comparison to determine whether the witness is the author of certain writings;

(e) That the Grand Jury is seeking to obtain handwriting and printing exemplars by the use of its subpoena powers because probable cause does not exist for the witness' arrest;

(f) That the Affidavits inspected by the lower court, in addition, violate witness' constitutional rights under the Fifth Amendment of the United States Constitution, denying him due process of law, in that he is operating in a vacuum, not knowing what the Affidavits contain;

(g) Additionally, his Fourth Amendment rights as to unreasonable searches under the Fourth Amendment are violated, in that he can not question the validity or the legality of the Affidavits;

(h) That no warrant is involved herein;

(i) That the Fourth Amendment bans wholesale instrusion upon personal security, fishing expeditions and searches and seizures which are unreasonable;

(j) That what the Government seeks is a one man show up of a crime under investigation, in violation of his Sixth Amendment right to counsel; that it uses a Grand Jury subpoena and its own private speculation for an arrest warrant and the accompanying probable cause that should be made to an independent magistrate;

(k) That the witness was directed to give handwriting and printing exemplars not to the Grand Jury, but to agents of the Government, and that such direction is without the boundaries of the Grand Jury's authority;

(l) That to preclude counsel for the witness from accompanying him into the Grand Jury Room violates his constitutional right to right of counsel under the Sixth Amendment;

(m) That an investigation by a Grand Jury does not excuse unreasonableness. The Court should consider the cases of: In Re Antonio Dionisio and Charles Bishop Smith, 442 F2nd 276 (7Cir) (1971); U.S. v. Bailey, 372 F.Supp. 802 (1971); Davis v. Mississippi, 394 U.S. 721 (1969).

WHEREFORE, witness-appellant, RICHARD J. MARA, also known as RICHARD J. MARASOVICH, prays for an order staying the order of commitment and for bond pending appeal.

Respectfully submitted,

ANGELO RUGGIERO
Counsel for witness-appellant

SUPREME COURT OF THE UNITED STATES

No. 71-850

UNITED STATES, PETITIONER

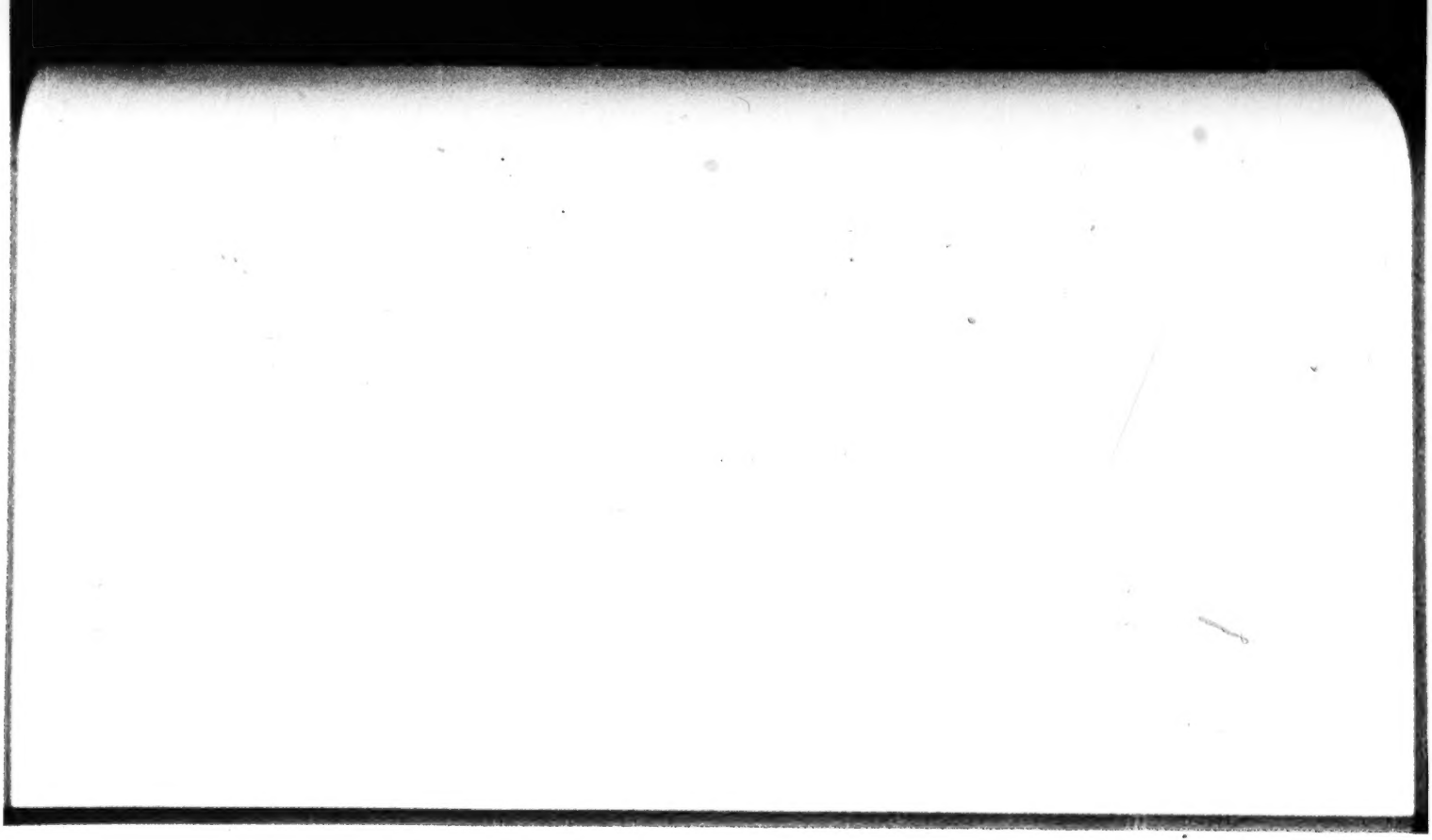
v.

IN RE SEPTEMBER 1971 GRAND JURY, RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH

ORDER ALLOWING CERTIORARI—Filed May 30, 1972

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and is to be argued with No. 71-229.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 471831 22



In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA, PETITIONER

v.

IN RE SEPTEMBER 1971 GRAND JURY,
RICHARD J. MARA, A/K/A RICHARD J. MARASOVICH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9-17) is not yet reported.

JURISDICTION

The judgment and mandate of the court of appeals was entered on December 2, 1971 (App. E, *infra*, pp. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment bars compelling a grand jury witness to furnish the grand jury handwriting and printing exemplars for comparison with writings before it, unless the government shows that the grand jury's request for such exemplars is "reasonable."

2. If the Fourth Amendment requires such a showing, whether the government must establish "reasonableness" in an adversary hearing in open court.

3. If a showing of reasonableness is required, what kind of showing must the government make to meet that standard and whether it must show that the exemplar cannot be obtained from other sources without grand jury compulsion.

STATEMENT

The September 1971 Grand Jury in the Northern District of Illinois is investigating thefts of interstate shipments. It has received as exhibits certain writings which are relevant evidence. Respondent Mara was subpoenaed by the grand jury to furnish handwriting and printing exemplars for comparison with these writings.

Mara appeared before the grand jury pursuant to its subpoena on September 23 and 28, 1971. He was informed that he was a potential defendant in the matter being investigated, and was then directed to furnish the exemplars. On both occasions, he refused to do so.

A petition was then filed in the district court seeking an order directing respondent to furnish the exemplars. The district court, following consideration *in camera* of an affidavit by an F.B.I. agent stating the basis for seeking the exemplars from Mara, ordered him to furnish the exemplars (App. B, *infra*, pp. 18-19). When Mara again refused to do so, the district court adjudged him guilty of civil contempt, and committed him to the custody of the United States Marshal until he obeyed the order (App. C, *infra*, pp. 20-21).[1]

The court of appeals reversed (App. A, *infra*, pp. 9-17). Relying on its opinion in *In re Dionisio*, 442 F. 2d 276 (C.A. 7), pending on the government's petition for a writ of certiorari, No. 71-229, it held that "compelling * * * [a grand jury witness] to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its [the Fourth Amendment's] reasonableness requirement * * *" (App. A, *infra*, pp. 10-11).

The court then considered "the procedure the Government must follow in attempting to demonstrate that the proposed seizure of the exemplars is reasonable," and "the content of the reasonableness showing necessary" (*id.* at p. 11). It rejected the *in camera* approach employed by the district court, ruling that "the Government must show reasonableness by presenting its affidavit [or other proof] in open court in

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[1] The court of appeals released respondent on bail pending his appeal to that court (App. D, *infra*, pp. 22-23).

order that * * * [the witness] may contest its sufficiency" (*ibid.*). As for "[t]he substantive showing that the Government must make", the court held that the government was required to prove "that the grand jury investigation was properly authorized, * * * that the information sought is relevant to the inquiry, and that * * * the grand jury process is not being abused" (*id.* at pp. 15-16). With respect to the last criterion, the court held that the government's affidavit before the district court was not sufficiently detailed to establish the necessary connection between the identification evidence sought and the purpose to be served. The court also stated that it is "an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigative agencies of Government," without first demonstrating "why satisfactory * * * exemplars cannot be obtained from other sources without grand jury compulsion," which had not been done here (*id.* at p. 16).

REASONS FOR GRANTING THE WRIT

This case presents the question of the proper application of the Fourth Amendment to attempts by a grand jury to obtain handwriting exemplars. It thus complements the *Dionisio* case, No. 71-229, which involves voice exemplars. The decision below is much more than a reiteration and extension of *Dionisio*; in requiring an adversary hearing, in finding the government's affidavit insufficient, and in deciding that it is an abuse of the grand jury process

to compel the production of evidence that might be obtained in some other way, the court goes significantly beyond the holding in *Dionisio* that a showing of reasonableness is required.

1. In our petition in *Dionisio*, we set forth at length the reasons why this Court should review the issue whether a grand jury request that a witness furnish physical evidence directly connected to the matter under investigation is not enforceable, unless the government shows that the request satisfies a "reasonableness" test under the Fourth Amendment. It has long been established that the grand jury has broad powers of investigation, and that witnesses before it are not entitled to set limits to the investigation that it is conducting or to be shown the basis for its questions. See *Blair* v. *United States*, 250 U.S. 273, 281-282; *Hale* v. *Henkel*, 201 U.S. 43, 65. This power necessarily carries with it the right to obtain evidence from witnesses.

The holding below breaks sharply with the recognized authorities in this area. It greatly expands the protections afforded by the Fourth Amendment in grand jury proceedings, and conflicts with the broad investigatory powers of the grand jury. The ruling is not necessary to safeguard protected rights of witnesses before the grand jury, since any "invasion" of the privacy of witnesses is exceedingly narrow. Compare *Davis* v. *Mississippi*, 394 U.S. 721, 727; *Schmerber* v. *California*, 384 U.S. 757, 771.

We rely on our *Dionisio* petition, a copy of which we are serving on respondent, for a full discussion of the pertinent authorities, the significance of the

disposition of this issue, and the appropriateness of review by this Court.

2. The court of appeals also held that the government must establish "reasonableness" in an adversary hearing in open court, and must prove that the exemplars cannot be obtained from other sources without grand jury compulsion. In our view, even assuming arguendo that *Dionisio* is correct, the rulings on these subsidiary issues are incorrect, and present substantial questions that warrant plenary review by the Court. If the Fourth Amendment does limit the powers of the grand jury as *Dionisio* indicates, it is important to settle as quickly as possible the applicable substantive standards and the procedures by which compliance with the Fourth Amendment can be measured.

We submit that the government should be entitled to show that a grand jury request satisfies Fourth Amendment requirements in an *ex parte, in camera* proceeding before a magistrate, as is the customary procedure in analogous Fourth Amendment situations where a search warrant or an arrest warrant is sought. This Court's decision in *Alderman* v. *United States*, 394 U.S. 165, on which the court below relies (App. A, *infra*, pp. 11-12), is not apposite. The issue there concerned the exclusion of evidence that was the product of an admittedly unlawful search. The basic issue here, in contrast, is whether proposed governmental action is lawful when measured by Fourth Amendment standards. This "threshold question" may properly be decided in *ex parte, in camera* proceedings.

The showing of reasonableness made by the government here was, we think, adequate. The affidavit submitted to the district court[2] clearly states the nature of the unlawful activities under investigation by the grand jury, the origin and character of the writings introduced as exhibits before the grand jury, and the suspected relationship of respondent to those writings that led to seeking the exemplars from him. The information thus set out would satisfy Fourth Amendment requirements for a search warrant, and would permit seizure under it of existing exemplars. Though we believe that "reasonableness" in this context demands a less strong showing than probable cause, since the invasion of privacy is so slight, certainly where, as here, that more stringent standard is met, it should be sufficient to satisfy Fourth Amendment limits on the power of the grand jury to compel exemplars. There is no constitutional basis for the requirement of the decision below, that the government show further why exemplars cannot be obtained without grand jury compulsion from other sources through more "regular" government investigative agencies.

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[2] This affidavit is in the record filed in the court below, which we have requested to be transmitted to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted with the petition in No. 71-229.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Acting Assistant Attorney General.

WM. TERRY BRAY,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
Attorney.

DECEMBER 1971.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 SEPTEMBER SESSION, 1971

No. 71-1740

IN RE SEPTEMBER 1971 GRAND JURY
RICHARD J. MARA, A/K/A RICHARD J. MARASOVICH,
WITNESS-APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 71-GJ-4060

HON. EDWIN A. ROBSON, *Chief Judge*

DECEMBER 1, 1971

Before FAIRCHILD, CUMMINGS, and KERNER, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Pursuant to a grand jury subpoena, petitioner appeared before the September 1971 Grand Jury in the Northern District of Illinois on September 23 and 28, 1971. The Grand Jury was investigating possible violations of the con-

spiracy provision of the Criminal Code (18 U.S.C. § 371) and of the provision proscribing thefts of interstate shipments (18 U.S.C. § 659). The Government advised petitioner that he was a potential defendant in that investigation. On both occasions, he was directed by the foreman of the Grand Jury to furnish handwriting and printing exemplars to its designated agent, but he refused to do so on constitutional grounds. After considering the Government's petition for a court order directing Mara to furnish such exemplars of his handwriting and printing as the Grand Jury deemed necessary, and after considering *in camera* an affidavit of FBI Special Agent William L. Buchanan, the district court ordered Mara to furnish the exemplars to the Grand Jury, obviously agreeing with the United States Attorney that this was "essential and necessary" to the Grand Jury's investigation in order to determine whether petitioner was "the author of certain writings." Later that day Mara refused to obey the court's order and was therefore adjudged in contempt and committed to the custody of the United States Marshal for the Northern District of Illinois "until such time as said respondent shall obey said order."

On appeal, petitioner's principal argument is that the order directing him to furnish the exemplars constituted an unreasonable search and seizure within the meaning of the Fourth Amendment.[1] Under our opinion in *In re Dionisio*, 442 F.2d 276 (7th Cir. 1971) (*per curiam*),[2] it is plain that compelling peti-

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[1] Although petitioner also relies on the Fifth and Sixth Amendments, comparable arguments were rejected in *In re Dionisio*, 442 F.2d 276, 278 (7th Cir. 1971).

[2] See also *United States* v. *Bailey*, 327 F.Supp. 802 (N.D. Ill. 1971).

tioner to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its reasonableness requirement,[3] and that the present proceeding is not a premature challenge. Specifically, this appeal raises two issues necessarily generated by *Dionisio*. The first concerns the procedure the Government must follow in attempting to demonstrate that the proposed seizure of the exemplars is reasonable. The second focuses on the content of the reasonableness showing necessary to obtain the order sought below.

To show reasonableness, the Government submitted the aforementioned affidavit of Agent Buchanan *in camera* to the district court. The affidavit was then impounded without being shown to petitioner or his counsel. Petitioner challenges the adequacy of this secretive, *ex parte* procedure as nullifying his Fourth Amendment rights and so deficient under the due process clause of the Fifth Amendment.

In our view, to justify the reasonableness of a request to furnish handwriting and printing exemplars to the Grand Jury, the Government must show reasonableness by presenting its affidavit in open court in order that petitioner may contest its sufficiency. Cf. *United States* v. *Roth*, 391 F.2d 507 (7th Cir. 1967). This will accord with the traditional preference for adversary proceedings as the superior means for attaining justice under our system of criminal justice. *Alderman* v. *United States*, 394 U.S. 165, 183; *Dennis* v. *United States*, 384 U.S. 855, 873-875. As the Supreme Court has stated in a related context, "[a]dversary proceedings * * * will substantially re-

[3] Since a warrant was not involved, this seizure is to be tested by reasonableness rather than by probable cause. *In re Dionisio*, *supra* at 280.

duce [the] incidence [of error] by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information, obtained and suggested by the [*in camera*] materials, will be unable to provide the scrutiny which the Fourth Amendment's exclusionary rule demands." *Alderman* v. *United States*, *supra* at 184; see also *Dennis* v. *United States*, *supra* at 874-875.

It is true, of course, that arrest or search warrants normally issue from an *ex parte* proceeding in which a "neutral and detached" magistrate is the only initial buffer between government and citizen. *Aguilar* v. *Texas*, 378 U.S. 108, 110-111; *Johnson* v. *United States*, 333 U.S. 10, 13-14. But that procedure provides no analogy for the proper constitutional requisite in the present context. The term "reasonable" as used in the Fourth Amendment, like "due process" in the Fifth, demands a measure of constitutional sufficiency which varies with the situation presented. In the warrant situation, difficulties of locating a suspect or possessor of evidence, the problems of apprehension, the destructibility of evidence, the need for promptness to protect the public against violence and to prevent repetition of criminal conduct necessitate the *ex parte* nature of the warrant issuance proceeding. However, none of these considerations ordinarily underlies a petition to force compliance with a grand jury request for exemplars. Apart from the argument based on the need for secrecy of grand jury proceedings (discussed *infra*), the United States has failed to show how disclosure of its affidavit in an adversary hearing would significantly impair the administration of criminal justice. On the contrary, there is a "growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Den-*

nis v. *United States*, *supra* at 870; see also *United States* v. *Amabile*, 395 F.2d 47, 53 (7th Cir. 1968), certiorari denied, 401 U.S. 924.

More important, unlike the warrant situation where the accused will have an opportunity to contest the sufficiency of the warrant on a motion to suppress before he may be tried and imprisoned (Federal Rules of Criminal Procedure 41(e); *Giordenello* v. *United States*, 357 U.S. 480, 484), here failure to allow the witness effectively to oppose the Government's petition has resulted in an indefinite incarceration for an unchallengeable reason. We cannot condone such manifest unfairness.

The Government argues that the hearing on its petition to enforce the grand jury's direction must be *ex parte* rather than adversary in nature in order to protect the secrecy of grand jury proceedings. By now it should be apparent that "grand jury secrecy" is no magical incantation making everything connected with the grand jury's investigation somehow untouchable. *Dennis* v. *United States*, *supra* at 868-873; *United States* v. *Amabile*, *supra* at 53. However, even according the secrecy privilege the broadest justifiable scope, disclosure of the present affidavit would not trench upon its boundaries.

We have examined the affidavit and find that it does not recount proceedings before the grand jury. Rather, it states the results the Government derived from its own investigation and then presented to the grand jury. Thus disclosure here cannot be said to discourage the grand jurors from engaging in uninhibited investigation, full discussion, and conscientious voting. Since he is requesting the disclosure, certainly Mara could not be heard to object that the affidavit might reveal disparaging information about him. Moreover, he has been advised that he is a potential

defendant so that the Government cannot convincingly contend that divulging the material in the affidavit would precipitate his flight from prosecution. In any case, the Government is well aware of the means at its disposal to prevent escape.[4] Finally, the affidavit does not appear to contain information elicited from complainants and witnesses before the grand jury. Where anonymity is necessary to prevent intimidation or preserve sources of information, deletion of the witnesses' identity may be permitted under the proper standards of trustworthiness and reliability. See *Jones* v. *United States*, 362 U.S. 257, 271-272; *Rugendorf* v. *United States*, 376 U.S. 528, 533; *Aguilar* v. *Texas*, *supra* at 114; *Spinelli* v. *United States*, 393 U.S. 410, 415-419; *United States* v. *Harris*, 403 U.S. 573.

Disclosure of the affidavit in open court is particularly appropriate where, as here, the information contained therein is the fruit of the Government's own investigatory activity and does not bear the imprint of the grand jury's independent initiative. Such disclosure should serve to curtail any attempt to circumvent the requirements of the Fourth Amendment by interposing the grand jury between it and the citizen under investigation. *In re Dionisio*, *supra* at 280-281; *United States* v. *Bailey*, *supra* at 803. We conclude that disclosure of information not clearly under the veil of grand jury secrecy is needed to protect citizens from infringement of their Fourth Amendment rights through abuse of the grand jury process.

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[4] If the Government has probable cause to believe that disclosure of its affidavit in an adversary proceeding will precipitate the disappearance of the witness, it may procure a material witness arrest warrant. See *Bacon* v. *United States*, —— F.2d ——, 40 U.S.L.W. 2219 (9th Cir. 1971).

The Government sometimes may be unable to carry its burden of showing reasonableness in open court without jeopardizing the values that grand jury secrecy is meant to protect. In such rare instances, the Government may properly approach the court to preserve the confidentiality of those portions of the affidavit which ought not be exposed. We are confident that in deciding what matters may be withheld, the district court will be guided not by a blind obeisance to grand jury secrecy but solely by the purposes which are truly served by this privilege. *Dennis* v. *United States*, *supra* at 872, note 18; see Federal Rules of Criminal Procedure 6(e).

The substantive showing that the Government must make to justify the order it seeks is that the grand jury's direction to furnish exemplars is "reasonable." *In re Dionisio*, *supra* at 280-281. Reasonableness in this context is not necessarily synonymous with probable cause.[5] Like the reasonableness requirement applied to a grand jury subpoena to produce documentary evidence, a reasonable direction to furnish exemplars requires that the Government's affidavit show that the grand jury investigation was properly authorized, for a purpose Congress can order, that the information sought is relevant to the inquiry, and

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[5] Although the Supreme Court remarked that it "has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution," *Chambers* v. *Maroney*, 399 U.S. 42, 51, the reference was to an actual non-consensual intrusion into protected privacy and not to a request to furnish physical characteristics for identification purposes under pain of contempt. The reasonableness requirement means something less than probable cause if the intrusion is limited. See *Terry* v. *Ohio*, 392 U.S. 1, 24-27. Moreover, the aegis of the grand jury was not involved in *Chambers*.

that the grand jury's request for exemplars is "adequate, but not excessive, for the purposes of the relevant inquiry." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209. Because a request for exemplars is distinguishable from a subpoena duces tecum—indeed it is a unique phenomenon—we interpret "adequate but not excessive" to mean that the Government must affirmatively show that the grand jury process is not being abused.

As the Court indicated in *Dionisio*, it would be an abuse of the grand jury process for the Government to conduct a general fishing expedition under grand jury sponsorship with the mere explanation that the witnesses are potential defendants. 422 F.2d at 281. Consequently, in order to insure that there is a sufficiently explicit connection between the identification evidence sought and the purpose to be served, the Government must submit a somewhat more detailed affidavit than the one previously supplied to the district court. However, this does not mean that there must always be probable cause to believe such evidence will disclose an offense or that the witness committed it.

In addition, we hold it to be an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigative agencies of Government. Therefore, the Government's affidavit must also show why satisfactory handwriting and printing exemplars cannot be obtained from other sources without grand jury compulsion.

In accordance with a suggestion in the Government's brief in the *Dionisio* case, *supra*, if the Government makes an adequate showing of reasonableness for the compulsion of these exemplars, they should

be furnished in the grand jury room as part of its process if petitioner prefers that course in lieu of furnishing them to the FBI in the presence of his counsel (in accordance with the option extended him by the Government). See *In re Dionisio, supra* at 279, note 1.

Without an open and sufficiently stringent test of reasonableness to support the order compelling the furnishing of the exemplars, petitioner's incarceration was unjustified. Therefore, the contempt judgment is reversed, and the cause is remanded for further proceedings consistent herewith. Our mandate will issue forthwith.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 GJ 4060

IN RE:

RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, A witness before the September 1971 Grand Jury

ORDER

On petition of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, Eastern Division, the court having read and considered said petition and having heard the argument of counsel, finds:

1. The September 1971 Grand Jury for the Northern District of Illinois, Eastern Division, is now conducting an investigation involving possible violations of Title 18, United States Code, Sections 371 and 659.

2. Respondent, Richard J. Mara, also known as Richard J. Marasovich, appeared before said Grand Jury on September 23, 1971 and September 28, 1971. On both occasions, the foreman of the Grand Jury directed the respondent to furnish exemplars of his handwriting and printing, as more fully set forth in the petition of the United States Attorney. On both occasions, the respondent refused to furnish said exemplars asserting his constitutional privilege. Said privilege on each occasion was improperly asserted by the respondent. Respondent has no constitutional privilege to refuse to furnish the handwriting and printing exemplars demanded by the Grand Jury.

IT IS THEREFORE ORDERED that respondent Richard J. Mara, also known as Richard J. Marasovich, furnish before and to the September 1971 Grand Jury of the United States District Court for the Northern District of Illinois, such exemplars of respondent's handwriting and printing as the said Grand Jury deems necessary.

ENTER:

/s/ Edwin A. Robson
Chief Judge
United States District Court for
the Northern District of Illinois

Dated at Chicago, Illinois
this 28 day of September, 1971.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 GJ 4060

IN RE:

RICHARD J. MARA, also known as, RICHARD J. MARASOVICH, A witness before the September 1971 Grand Jury

JUDGMENT AND COMMITMENT

On motion of WILLIAM J. BAUER, United States Attorney for the Northern District of Illinois, for an order by the Court to enforce its order of September 28, 1971, heretofore entered in the above-entitled matter, the respondent, RICHARD J. MARA, appearing before the Court in person and with counsel, and said respondent having admitted that he had refused and would continue to refuse to furnish exemplars of his handwriting and printing before and to the September 1971 Grand Jury, the Court having heard argument of counsel:

IT IS ADJUDGED that respondent, RICHARD J. MARA, is in direct and continuing contempt of this Court for his failure to obey the order of this Court, dated September 28, 1971, heretofore entered herein.

IT IS THEREFORE ORDERED that respondent, RICHARD J. MARA, be and he hereby is committed to the custody of the United States Marshal for the Northern District of Illinois until such time as said respondent shall obey said order.

ENTER:

/s/ Edwin A. Robson
Chief Judge
United States District Court for
the Northern District of Illinois

Dated at Chicago, Illinois
this 28 day of Sept., 1971.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Friday, October 22, 1971

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. OTTO KERNER, Circuit Judge

No. 71-1740

IN RE: RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH, a witness before the September 1971 Grand Jury

RICHARD J. MARA, APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This matter is before the Court on the emergency motion of Richard J. Mara, Witness-Appellant, for bond pending appeal, and the Government's answer. 28 U.S.C. § 1826 permits the admission of witnesses to bail pending appeal if it appears the appeal is not frivolous or taken for delay. We find that the appeal is not frivolous or taken for delay.

IT IS THEREFORE ORDERED that Richard J. Mara be released pending appeal from the custody of the U.S. Marshal for the Northern District of Illinois after posting a $2500 cash bond with the Clerk of the District Court for the Northern District of Illinois.

IT IS FURTHER ORDERED, pursuant to 28 U.S.C. § 1826, that the parties observe the following schedule for briefs and argument:

> Appellant's brief to be filed on or before October 28. Government's brief to be filed on or before November 4. Appellant's reply brief to be filed on or before November 8. Oral argument set for 2 P.M., November 8.

APPENDIX E

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division

Greetings:

Whereas, lately in the United States District Court for the Northern District of Illinois, Eastern Division before you, or some of you, in a cause between IN RE: SEPTEMBER 1971 GRAND JURY, Witness RICHARD J. MARA, also known as RICHARD J. MARASOVICH; No. 71 O.J. 4060; orders were entered on the twenty-eight day of September 1971 and the eighth day of October, 1971 as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Seventh Circuit by virtue of an appeal by RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH, agreeably to the act of Congress, in such case made and provided, in fully and at large appears,

And Whereas, in the term of September, in the year of our Lord one thousand nine hundred and seventy-one, the said cause came on to be heard before the said United States Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel,

On Consideration Whereof, it is ordered and adjudged by this Court that the contempt judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, and that this cause be and the same is hereby, Remanded to the

said District Court for further proceedings in accordance with the opinion of this Court filed this day.

It Is Further Ordered by the Court that the mandate in this cause issue forthwith as directed in the opinion of this Court filed this day, December 1, 1971.

You, therefore are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, aught to be had, the said judgment notwithstanding. Witness, the Honorable Warren E. Burger, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and seventy-one.

/s/ Kenneth J. Carrick
Clerk of the United
States Court of Appeals
for the Seventh Circuit

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 452995 392

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-229

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO

No. 71-850

UNITED STATES OF AMERICA, PETITIONER

v.

IN RE SEPTEMBER 1971 GRAND JURY, RICHARD J. MARA, A/K/A RICHARD J. MARASOVICH

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The purpose of this memorandum is to bring to the Court's attention the Second Circuit's recent decision in *United States* v. *Doe* (*Cynthia Schwartz*), No. 663, September Term, 1971, decided March 28, 1972. A copy of that opinion is set forth in the Ap-

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pendix, *infra*. The court in that case affirmed a civil contempt conviction against a grand jury witness for refusing to furnish the grand jury handwriting exemplars. In his opinion for a unanimous court, Chief Judge Friendly rejected the argument that "the use of process to compel the furnishing of handwriting (or voice) exemplars to a grand jury constitutes a search or seizure within the Fourth Amendment which requires a preliminary showing of probable cause to believe that the witness' handwriting (or voice) resembles that of a person whom the Government has probable cause to believe has committed a crime" (Appendix, *infra*, pp. 3a–4a). He further rejected the position that the government must meet "even so apparently modest a requirement as a showing of 'reasonableness' * * *" (*id.* at pp. 9a–10a). In doing so he recognized that "a different view has been taken by the Seventh Circuit" in *Dionisio* and in *Mara*, and expressly declined to follow that court's view on the ground that "neither the reasoning nor the authorities cited [there] are persuasive" (Appendix, *infra*, p. 10a).

As a result, there is now a direct conflict of decisions between the Seventh and the Second Circuits. For this reason and for the reasons stated in the petitions for writs of certiorari in Nos. 71–229 and 71–850, we submit that the petitions should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 663—September Term, 1971.

(Argued March 9, 1972 Decided March 28, 1972.)

Docket No. 72-1209

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN DOE,

In the Matter of the Grand Jury Testimony and Contempt of CYNTHIA B. SCHWARTZ,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
TIMBERS, *Circuit Judge,* and JAMESON, *District Judge.**

Appeal from an order of the District Court for the Southern District of New York, Morris E. Lasker, *Judge,* adjudging appellant guilty of civil contempt for refusal to furnish handwriting exemplars to a grand jury.

Affirmed.

*Of the United States District Court for the District of Montana, sitting by designation.

FRIENDLY, *Chief Judge:*

On January 22, 1972, appellant Cynthia B. Schwartz appeared, pursuant to subpoena, before a grand jury in the Southern District of New York, which was conducting an investigation in regard to possible mail and wire frauds. The Assistant United States Attorney asked her to furnish samples of her writing of the names Cynthia Schwartz, Cynthia B. Brown, Dixbie Management Co., Dixbie Colossal Inc., National Angus of America, and National Beef Corporation. She refused, asserting her privilege against self-incrimination under the Fifth Amendment. On February 2, 1972, Judge Tyler directed her to execute the exemplars and appointed the Legal Aid Society to represent her. After she had again refused, on February 9, she and her counsel appeared before Judge Lasker. Counsel now asserted that the Fourth Amendment required the Government to show the reasonableness of its request. Judge Lasker reserved decision. Prior to another appearance before the judge on February 14, the Assistant, contending that in any event the request for exemplars was reasonable, submitted an affidavit stating that witnesses before the grand jury had indicated there were resemblances between the handwriting on certain exhibits and what they believed to be that of Cynthia B. Schwartz, and that other efforts to obtain specimens of her handwriting had been

unsuccessful. Counsel then took the more advanced position that the Government had the burden of showing "probable cause." On February 14, Judge Lasker directed Mrs. Schwartz to furnish the exemplars. When she again refused, on February 17, the judge cited her for civil contempt and sentenced her for thirty days, unless she sooner furnished the exemplars or the grand jury was discharged. However, he stayed the sentence for a week to permit application to this court for a further stay pending appeal. Another panel extended the stay and set the appeal for argument on March 9. After hearing argument we directed that the stay be vacated at 5:00 P.M. on March 13; this has been extended by the Supreme Court until its further order. We affirm the judgment of the district court.

Although appellant now makes no claim under the Fifth Amendment and relies solely on the Fourth, it is important for the latter purpose to underscore that no basis for a Fifth Amendment claim exists. *Gilbert* v. *California*, 388 U.S. 263, 265-67 (1967), held that the furnishing of handwriting exemplars did not constitute testimony within the protection of the self-incrimination clause. Combination of that holding with *United States* v. *Wade*, 388 U.S. 218, 222-23 (1967), leads inevitably to the conclusion that this is true even when a witness is asked to furnish specimens of his writing of names or words that had been used in the commission of a crime. We so held in *United States* v. *Doe (Devlin)*, 405 F.2d 436, 438-39 (2 Cir. 1968). Furthermore, whereas *Gilbert and Wade* had been concerned only with claims that the compelled furnishing of exemplars constituted compulsory self-incrimination and consequent error, *Doe* added the scarcely surprising gloss that, since no privilege existed, refusal to furnish handwriting exemplars justified a moderate sentence for civil contempt.

Appellant's argument is that the use of process to compel the furnishing of handwriting (or voice) exemplars to a

grand jury constitutes a search or seizure within the Fourth Amendment which requires a preliminary showing of probable cause to believe that the witness' handwriting (or voice) resembles that of a person whom the Government has probable cause to believe has committed a crime.[1]

Evaluation of her claim demands inquiry into the scope of the Fourth Amendment's protection and its relationship to and limitations upon the historic exercise of the grand jury's inquisitorial function. Despite appellant's contention that the Fourth Amendment creates a *per se* prohibition against compelled production, absent probable cause, of incriminating evidence not privileged by the Fifth Amendment, and the Government's argument of *per se* inapplicability of the Fourth Amendment to grand jury process except as a limitation upon compelled production too sweeping in scope, neither the language of the Amendment nor the history of its application supports either of these *per se* rules.

The Fourth Amendment, in relevant part, states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Exemplars, whether handwriting or voice, if covered at all, must be considered elements of "persons" rather than "houses, papers, and effects." Cf. *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). Decisions dealing with "interferences with property relationships or private papers," *Id.* at 767-68, thus are marginally relevant at best. The Court has had relatively little occasion to discuss the extent of the protection given to the person by the Fourth Amendment save in the context of arrests. Perhaps the most useful statement is that of the Chief Justice in *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968), borrow-

1 At least this is our best understanding of what counsel means by "probable cause" in this context; appellant's brief seems to take varying positions on this point.

ing from Mr. Justice Harlan's concurring opinion in *Katz* v. *United States*, 389 U.S. 347, 360 (1967): "[W]herever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968).

It is too plain to demand extended argument that a "reasonable expectation of privacy" does not relieve of the requirement of appearance before a grand jury or other properly constituted tribunal, although this does interfere with an individual's ability to do exactly what he does or does not please. In *United States* v. *Bryan*, 339 U.S. 323, 331 (1950), relating to testimony before a Congressional committee, the Court quoted with approval Dean Wigmore's statement that, "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence," 7 Wigmore, Evidence (3d ed.) § 2192. Still more pertinently the Court observed in *Blair* v. *United States*, 250 U.S. 273, 280-81 (1919):

> At the foundation of our Federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. . . . [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned . . . .

No preliminary showing of need or relevancy is required before a person may be subpoenaed to appear before a grand jury. Indeed, the Seventh Circuit, whose decision in *In re Dionisio*, 442 F.2d 276 (1971), constitutes appellant's chief reliance, has recently so held. *Fraser* v. *United States*, 452 F.2d 616 (7 Cir. 1971). Even the fact that the witness

may himself be the subject of the grand jury investigation does not entitle him to refuse to *appear*. See *United States* v. *Scully*, 225 F.2d 113 (2 Cir.), *cert. denied*, 350 U.S. 897 (1955); *United States* v. *Winter*, 348 F.2d 204, 207-08 (2 Cir.), *cert. denied*, 382 U.S. 955 (1955). The distinction between the compulsion exerted by a subpoena and detention by law enforcement officers is far from being a mere matter of words. The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.

This case thus differs fundamentally from *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Terry* v. *Ohio*, *supra*; and *Schmerber* v. *California*, *supra*, the Supreme Court decisions most strenuously pressed upon us. In each of those cases the Court found a police-citizen encounter which amounted to a "seizure" of the person within the meaning of the Fourth Amendment, although on the facts not an unreasonable one. In *Terry* and *Schmerber* the initial encounters were followed by police practices which themselves constituted "searches," although these were again held to be reasonable—in *Terry*, the pat-down of the suspect's clothing for concealed weapons and in *Schmerber*, the extraction of blood from the suspect's arm. In *Davis* it was the initial detention that was found to violate the Fourth Amendment and thus to invalidate the use at trial of Davis' fingerprints taken while he was unlawfully detained. See *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Here there was no illegality in the compelled appearance.

On the other hand, the fact that compulsory appearance before a grand jury is not a seizure of the person does not lead automatically to the conclusion that nothing the grand jury may require could constitute a search. The test must be whether the requirement invades a "reasonable expectation of privacy." Presumably no one would contend that requiring a grand jury witness to remove a mask, in order to permit comparison with surveillance photographs, constituted a "search"; there is no "reasonable expectation of privacy" about one's face. On the other side of the line, according to *Schmerber*, is a blood test; so perhaps, although we need not decide the point, would be a demand for the display of identifying characteristics such as scars or birthmarks on parts of the body not normally exposed.[2] Handwriting and voice exemplars fall on the side of the line where no reasonable expectation of privacy exists. Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection, *Katz* v. *United States*, *supra*, the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large. When appellant's case is properly analyzed, *Davis* v. *Mississippi* becomes an authority for the Government

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2 Some of the examples of more intrusive examination of the body cited in 8 Wigmore, Evidence §2216 at 166-67 n. 3 (McNaughton rev. 1961) would more clearly be protected in the absence of a preliminary showing of need.

rather than against it. For the Court there said that fingerprinting, surely more nearly private than examplars of the voice or handwriting, "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." 394 U.S. at 727.

Appellant argues that to permit the prosecutor to accomplish through use of the grand jury what he might not be able to accomplish without it would subvert the purposes underlying the Fourth Amendment. Aside from the fact, as previously indicated, that the purposes underlying the Fourth Amendment are not offended by what has here been requested, her argument overlooks an important aspect of the grand jury's function—that of acting as a protective buffer between the accused and the prosecutor. The grand jury was regarded by the founders, not as an instrument of oppression but as a safeguard of liberty so important as to be preserved in the Fifth Amendment. In *Ex parte Bain*, 121 U.S. 1, 10-11 (1887), Mr. Justice Miller quoted with approval from a charge given by Mr. Justice Field, 2 Sawyer 667:

> And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which gave to it its chief value in England,

> and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan or private enmity.

In *Stirone* v. *United States*, 361 U.S. 212, 218 (1960), Mr. Justice Black said that

> The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of fellow citizens acting independently of either prosecuting attorney or judge.

In order for the grand jury to function, it must have the cooperation of citizens in producing evidence, and of doing that quickly, subject, of course, to the limits imposed by the Fifth Amendment privilege. The safeguards built into the grand jury system, such as enforced secrecy and use of court process rather than the constable's intruding hand as a means of gathering evidence, severely limit the intrusions into personal security which are likely to occur outside the grand jury process. To be sure, on occasion, a grand jury may overstep bounds of propriety either at its own or the prosecutor's instance, and conduct an investigation so sweeping in scope and undiscriminating in character as to offend other basic constitutional precepts. When this occurs courts are not without power to act, *see, e.g.*, *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906); *Blair* v. *United States, supra*, 250 U.S. at 281. But there is no indication that anything of the kind was involved here. Apart from such cases, when the grand jury has engaged in neither a seizure nor a search, there is no justification for a court's imposing even so apparently modest a requirement as a showing of "reasonable-

ness"—with the delay in the functioning of the grand jury which that would inevitably entail.

We recognize that a different view has been taken by the Seventh Circuit in *In re Dionisio, supra,* 442 F.2d 276 which was followed in *In re Mara,* No. 71-1740 (7 Cir. December 1, 1971). With respect, neither the reasoning nor the authorities cited are persuasive to us. The court stated that "compelling a person to furnish an exemplar of his voice is as much within the scope of the Fourth Amendment as is compelling him to produce his books and papers." 442 F.2d at 279. But, aside from the fact that, as already pointed out, those decisions involving "interferences with property relationships or private papers," *Schmerber* v. *California, supra,* 384 U.S. at 767, are marginally relevant at best, the Fourth Amendment has not been held to forbid compulsory production of books and papers before a grand jury save in two types of situations: One is stated in *Boyd* v. *United States,* 116 U.S. 616 (1886), where the majority, over the dissent of Mr. Justice Miller and Chief Justice Waite, held that compulsory production of incriminating documents before a grand jury violated not only the self-incrimination clause of the Fifth Amendment, as all the Justices agreed, but the Fourth as well. While Dean Wigmore believed that "the Supreme Court has to a large extent recanted that part of the Boyd dicta which would apply the Fourth Amendment to an order to produce a document, properly a Fifth Amendment concern," 8 Wigmore, Evidence §2264, at 381-84, n. 4 (McNaughton rev. 1961), we need not consider this, since, as developed at the outset, Mrs. Schwartz was not directed to produce anything that was testimonial in nature. The other situation is reflected in the statement in *Hale* v. *Henkel, supra,* 201 U.S. at 76, that a grand jury subpoena duces tecum too sweeping in its terms "may constitute an unreasonable search and seizure within the Fourth Amendment." We note that in *Oklahoma Press Publishing Co.* v.

Walling, 327 U.S. 186, 208 (1941), the Court in referring to the problem, spoke of "the Fourth [Amendment], if applicable," which might mean that protection against too sweeping subpoenas was furnished rather by the due process clause. This likewise need not be considered, since no issue of unreasonable scope was here presented. The authorities relied upon in *Dionisio* were *Boyd* v. *United States, supra; Hale* v. *Henkel, supra;* and *Davis* v. *Mississippi, supra.* As previously indicated, we do not believe that those cases lead to the result the court reached; indeed, as indicated, we believe *Davis* v. *Mississippi* points exactly the other way.

While the Eighth Circuit has also recently held that a demand by law enforcement officers for handwriting exemplars is subject to the Fourth Amendment, though under a standard of less than probable cause for an arrest, *United States* v. *Harris* and *United States* v. *Long*, Nos. 71-1220-21 (8 Cir. January 12, 1972), those cases dealt with action by police—in one instance in the defendant's home, in the other while he was under arrest—not pursuant to a subpoena before a grand jury. While the Eighth Circuit concluded that, in addition to the police-citizen encounter being a seizure, the taking of a handwriting exemplar was itself a search, we find the court's reasoning unconvincing on this point. In support of its conclusion the court in *Harris* pointed to proposed new Rule 41.1, Nontestimonial Identification, of the Federal Rules of Criminal Procedure. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 52 F.R.D. 409, 462 (1971). As the Advisory Committee Note following the rule indicates, this proposed rule "provides a procedure by which a federal magistrate may issue an order authorizing a nontestimonial identification procedure" by law enforcement officers. 52 F.R.D. at 467. The proposed rule specifically takes account of the decision in *Davis* v. *Missis-*

sippi, supra, with respect to the fruits of unlawful detention and, in accordance with a suggestion in that opinion, provides for nontestimonial compulsory identification before law enforcement officers on a showing less than the probable cause required to make an arrest. Neither the proposed rule nor the Advisory Committee Note implies that the Government must make a preliminary showing before a grand jury witness can be required to give a moderate number of handwriting exemplars. The Advisory Committee Note, in fact, makes reference to our decision in *United States* v. *Doe (Devlin), supra,* 405 F.2d 436, and states: "Compelling a suspect to submit to a nontestimonial identification procedure has been sustained when it is accomplished by means of a grand jury subpoena." 52 F.R.D. at 469. We find nothing inconsistent with our holding today in the proposed rule which merely recognizes the applicability of the Fourth Amendment to nontestimonial identification procedures when the initial police-citizen encounter places this within the protection of that Amendment.

If, contrary to our view, any showing is needed before a grand jury witness may be required to furnish handwriting exemplars, the test cannot be so severe as appellant urges. A determination that there are sufficient grounds for believing a crime has been committed and that the defendant has committed it to require him to stand trial, is the end result of a grand jury's investigation in cases where it returns a true bill. The Government can no more be required to meet that test with respect to a witness at a preliminary stage in that investigation than it would before calling a witness at the trial itself. All this was clearly recognized in *Hale* v. *Henkel, supra,* 201 U.S. at 65, and in *Blair* v. *United States, supra,* 250 U.S. at 282. Indeed, there may well be instances where the Government's purpose in seeking handwriting exemplars is not to show that the witness

has committed a crime but rather to show that he has not, e.g., when the true suspect says that incriminating writings were the work of the witness rather than himself.[3] Moreover, we have recently observed that the grand jury's scope of inquiry "is not limited to events which may themselves result in criminal prosecution, but is properly concerned with any evidence which may afford valuable leads for investigation of suspected criminal activity during the limitations period." *United States* v. *Cohn*, 452 F.2d 881, 883 (2 Cir. 1971). The Seventh Circuit has recognized that when a court order is involved, the test is merely one of "reasonableness." See *In re Mara, supra*, fn. 3. The prosecutor's affidavit that witnesses before the grand jury had indicated resemblances between Cynthia Schwartz' handwriting and material pieces of evidence in the grand jury's fraud investigation, and that definitive exemplars of her handwriting could not be otherwise obtained, would suffice to meet whatever slight burden of making a preliminary showing the Government might have under any view. However, for the reasons previously given, we hold that, with respect to a reasonable number of handwriting exemplars of a grand jury witness, it has none.

Affirmed.

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3 While normally such a witness would happily comply, cases are not unknown where an innocent third party has accepted "suggestions" that he "take the rap."

[redacted]

In The

Supreme Court of the United States

October Term, 1971

UNITED STATES OF AMERICA,

Petitioner,

vs.

IN RE SEPTEMBER 1971 GRAND JURY,
RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT.

The witness appeared pursuant to subpoena before the September, 1971 Grand Jury, in the Northern District of Illinois on September 23, 1971. He was directed by the United States Attorney to give handwriting and printing exemplars to an F.B.I. agent. Upon his refusal to do so he was instructed to obtain the services of counsel and

return on September 28, 1971. On September 28, he appeared with counsel and was again directed to give handwriting exemplars to an F.B.I. agent. Upon his refusal to do so, the United States Attorney directed the foreman of the Grand Jury to instruct the witness to give handwriting exemplars to an F.B.I. agent. The Petition for order seeking exemplars filed in the District Court stated that respondent was a potential defendant and that the exemplars were wanted solely as a standard of comparison in order to determine whether the witness is the author of certain writings. Neither the witness nor counsel were allowed to look at the F.B.I. Affidavit.

The witness appealed from the order of incarceration and raised the following points before the Circuit Court of Appeals:

1. Whether the order below violates the witness' rights under the Fourth Amendment as to privacy without probable cause.

2. Whether the order is a violation of witness' Fourth Amendment rights as being an unreasonable seizure.

3. Whether the order violates witness' privilege of self incrimination under the Fifth Amendment.

4. Whether the order violates witness' right to due process under the Fifth Amendment.

5. Whether the order violates witness' right to counsel under the Sixth Amendment.

6. Whether the government had authority to direct the Grand Jury to order the witness to give exemplars to a Government Agency, i.e. Federal Bureau of Investigation.

7. Whether the Government had authority to direct the witness to give exemplars to a government agency, i.e., Federal Bureau of Investigation.

8. Whether the order violates witness' rights under the Fourth and Fifth Amendments when based on Affidavits inspected in camera and not shown to witness nor his counsel.

QUESTIONS PRESENTED.

1. Whether the Government can compel a witness, by use of a Grand Jury subpoena, to submit handwriting and printing exemplars, to the Government and force compulsion, based upon an FBI Affidavit submitted *in camera* to a district Court without allowing a witness or counsel to see said affidavit, where the information contained in the affidavit did not emanate from any independent activity before that body.
2. Whether the Fourth and Fifth Amendments forbid such an abuse of the Grand Jury process.

REASONS FOR DENYING THE WRIT.

This case presents not only questions concerning the proper application of the Fourth Amendment to the Grand Jury process but also the abuse of the Grand Jury process by the Government bringing into play the due process and self incrimination clauses of the Fifth

Amendment. This case deftly illustrates the persistent proclivity of the Government by sundry means to subvert the rights of individuals guaranteed to them under the U.S. Constitution. Government probes, by the use of different plays, that document until it finds what it thinks is a soft underbelly. The methods used are ingenious.

In *Hill* v. *Philpott,* 445 F. 2nd 144, 7 Cir., (1970) the government sought a citizen's personal books and records by way of a search warrant. Its position was that once the validity of a search was established, the Fifth Amendment was not violated. The Government did not proceed by way of summons knowing full well that the Fifth Amendment applied. The Appeals Court rejected the Government's argument and ruled that obtaining a search warrant would not invalidate the Fifth Amendment.

In re Dionisio, 442 F. 2nd 276, 7 Cir., (1971), which is before this Court, the Appeals Court on Fourth Amendment grounds ruled that voice exemplars were not required to be given to a grand jury.

In *U. S.* v. *Baily,* 327 F. Supp. 802, N.D. Illinois (1971), the Government sought handwriting exemplars solely because an indictment had been returned as the showing of probable cause. The Court held that this was not sufficient and that what the Government sought was a fishing expedition. Lastly, in the instant case, the Government, by issuing a Grand Jury subpoena, seeks exemplars and incarceration, by an in camera affidavit by an F.B.I. agent which the witness cannot see nor refute.

Invoking the sanctity of the Grand Jury does not give the Government the right to violate the Fourth and Fifth Amendments nor the right to abuse the Grand Jury proc-

ess. The facts in Mara are unlike any in the cases cited by the Government or respondent. Respondent submits that on the facts as presented, Mara operates in a vacuum. The Government, by submitting an affidavit in camera, says the giving of exemplars is reasonable. Page 6 of the Government's petition states that the Fourth Amendment is satisfied by an ex parte, in camera proceeding, before a magistrate, analogous to Fourth Amendment situations where a search warrant or arrest warrant is sought. In a search warrant or arrest warrant procedure, the defendant can attack the validity of the affidavit. (See *U. S.* v. *Suarz,* 380 F. 2nd 713, 2 Cir., (1967), *U. S.* v. *Gillette,* 383 F. 2nd 843, 2 Cir. (1967), *U. S.* v. *Roth,* 391 F. 2nd 507, 7 Cir., (1967), *Rugendorf* v. *United States,* 376 U.S. 528 (1964), *Aguilar* v. *Texas,* 378 U.S. 108 (1964), *Spinelli* v. *United States,* 393 U.S. 410 (1968), Rule 41, Criminal Rules of Criminal Procedure).

Rule 41 provides that a warrant shall issue upon a sworn Affidavit establishing the grounds that there was probable cause. The Government's position, that an *ex parte in camera* proceeding is sufficient to meet the requirements of the Fourth Amendment, is spurious. By their own analogy, probable cause must be established by affidavit and thus the affidavit may be attacked on a motion to quash the search or the arrest. Here the Government has consistently refused to allow the Affidavit to be seen; by its own admission, states that the affidavit submitted by the F.B.I. is based upon suspicion, and for that reason seeks comparison of handwriting and printing exemplars. That there has been no probable cause for a warrant is indicated by the very fact that there

has been no indictment of the witness. It is not known upon what reasoning or theory the Government seeks to justify its position except that it wishes to seek exemplars by the use of a Grand Jury subpoena. As stated, the Grand Jury is not sacrosanct. As set forth in *Davis* v. *Mississippi,* 394 U.S. 721 (1969), nothing is more clear that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrest" or "investigatory detentions." *Davis* did not distinguish between Grand Juries or police actions, but directed its teachings to the Fourth Amendment and what that Amendment prevented Government from doing.

Furthermore, it is not reasonable nor adequate to sustain the position taken by the Government. (See *U. S.* v. *Praigg,* 336 F. Supp. 480 (1972) USDC CD Calif. and *In the Matter of Grand Jury; Riccardi, witness*; USDC NJ 10 CRL 2465 (1972)).

In *U. S.* v. *Doe,* No. 663, 2nd Cir., 1972 the Government submitted an affidavit stating that witnesses before the Grand Jury had indicated that there were resemblances between the handwriting on certain exhibits and what they believed to be that of the witness and that efforts to obtain specimens of the witness' handwriting had been unsuccessful. In the Opinion which is set forth in full in the Government's Supplemental Memorandum, the Government used the following language on page 15:

> "The prosecutor's affidavit that witnesses before the Grand Jury had indicated resemblances between Cynthia Schwartz' handwriting and material pieces of evidence in the Grand Jury's fraud investigation, and that definitive exemplars of her handwriting could not be otherwise obtained, would suffice to

meet whatever slight burden of making a preliminary showing the Government might have under any view."

The Government cites the *Doe* case in support of its argument, but clearly that Court supports the finding of the Seventh Circuit Court of Appeals in the instant case.

The procedure complained about violates not only the Fourth Amendment, but the due process clause of the Fifth Amendment, i.e., to incarcerate a man based upon something he cannot see or question. This is a practice which has never before been presented, under the guise of a grand jury, and it should not be countenanced by this Court. To allow so patent a device is to effectively give weight to the cry that a police state is what we live in today. For a Government can then get information it seeks by the issuance solely of a Grand Jury subpoena, on suspicion alone, and compel a witness to divulge anything the Government desires. There would thus be no effective barrier to Government in that the Fourth and Fifth Amendments would effectively be reduced to shambles.

Additionally, more and more Grand Juries have become rubber stamps for the Government in obtaining information. In the instant case it is the Government who is directing what the witness is to do. No one quarrels with the law as stated with reference to a Grand Jury. But a Grand Jury is independent and supposed to stand between the accuser and the accused. (*In re April 1956 Term Grand Jury,* 239 F. 2nd 263, 7 Cir. (1956)). A Grand Jury cannot act independently when the accuser is directing witnesses what to do and instructing the Grand Jury how to act. This is an abuse of the Grand

Jury process and what occurred in this case. What is sought is not a limitation of the Grand Jury power, only that it act independently and within the confines of the Constitution.

U. S. v. *Doe,* 663, 2nd Cir. (1972), cited by the Government in its supplemental memorandum, recognized that a Court is not without power to act when a grand jury oversteps its bounds and that a Grand Jury is supposed to act as a protective buffer between the accused and the prosecutor.

The obtaining of exemplars, if testimonial are within the purview of the Fifth Amendment. If the content of the exemplar is sought and thus testimonial, the Fifth Amendment prohibits the giving of it. (*Schmerber* v. *California,* 384 U.S. 757 (1966), *Gilbert* v. *California,* 388 U.S. 263 (1967), speak of giving non-communicative evidence for identification only. Both cases indicate that evidence, testimonial in nature, falls within the Fifth Amendment privilege. (See *U. S.* v. *Green,* 282 F. Supp. 373 (1968), *U. S.* v. *Irwin,* 322 F. Supp. 701 (1971), *In the Matter of Grand Jury; Riccardi, witness;* USDC NJ 10 CRL 2465 (1972)).

In *Doe,* the Court decided that the witness therein was not directed to produce anything that was testimonial in nature.

CONCLUSION.

For the foregoing reasons it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-229

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO DIONISIO, WITNESS
BEFORE THE SPECIAL FEBRUARY 1971 GRAND JURY

No. 71-850

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD J. MARA, WITNESS
BEFORE THE SPECIAL SEPTEMBER 1971 GRAND JURY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in No. 71-229 (Dionisio Pet. App. A 12-19) is reported at 442 F. 2d 276. The opinion of the district court in No. 71-229 (Dionisio Pet. App. C 22-24) is not reported.

The opinion of the court of appeals in No. 71–850 (Mara Pet. App. A 9–17) is reported at 454 F. 2d 580. The order of the district court in No. 71–850 (Mara Pet. App. B 18–19) was entered without an opinion and is not reported.

JURISDICTION

The judgment of the court of appeals in No. 71–229 was entered on March 25, 1971. On June 14, 1971, the court of appeals denied a petition for rehearing with suggestion for rehearing *en banc*. On July 8, 1971, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to August 13, 1971, and the petition was filed on that date; it was granted on May 30, 1972.

The judgment of the court of appeals in No. 71–850 was entered on December 1, 1971. The petition for a writ of certiorari was filed on December 30, 1971; it was granted on May 30, 1972.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment bars a grand jury that is investigating illegal activity from compelling a witness, without first showing that the request is "reasonable," to furnish a voice exemplar for comparison with exhibits consisting of records of lawfully intercepted wire communications, or to provide handwriting and printing exemplars for comparison with other writings before the grand jury.

2. If so, whether the preliminary showing needed to satisfy Fourth Amendment standards must be made in an open, adversary hearing.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

No. 71-229—*Dionisio*

The Special February 1971 Grand Jury was convened in the Northern District of Illinois for the purpose of investigating illegal gambling operations in and around the City of Chicago. During its investigation, it received as exhibits voice recordings obtained under court orders, based on warrants issued under 18 U.S.C. 2518 authorizing the interception of wire communications.

The grand jury then subpoenaed approximately twenty persons, including respondent Dionisio, and sought to obtain from them voice exemplars for identification purposes. Each witness was informed that he was a potential defendant in a matter under investigation by the grand jury. The witnesses were instructed to examine a transcript of an authorized recording of an intercepted communication, and to go to a nearby room and read the transcript into a telephone that was connected to a recording device.[1]

[1] The witnesses were to give the exemplars outside the grand jury room, so that they could have their lawyers present. Each witness was to accompany an FBI agent, who had been appointed as an agent of the grand jury by its foreman, to a telephone located in one of the offices of the United States Attorney. No objections were made to the location of the telephone or recording device.

Dionisio and other witnesses[2] refused to follow those instructions, asserting that the compelled disclosure of a voice exemplar before a grand jury violated rights guaranteed under the Fourth and Fifth Amendments (D. App. 9–10).[3]

The government then filed in the United States District Court for the Northern District of Illinois separate petitions to compel Dionisio and other witnesses to furnish voice exemplars to the grand jury. The petitions stated (D. App. 4–5) that the exemplars were "essential and necessary" to the grand jury investigation, and that they would "be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted * * *." Following a hearing, the district court rejected the various constitutional arguments of the witnesses and ordered that they provide the exemplars in compliance with the grand jury subpoenas (Dionisio Pet. App. C 22–24). When Dionisio persisted in his refusal to give a voice exemplar, the district court on February 22, 1972, adjudged him in civil contempt and committed him to prison until he obeyed the court order or until the term of the Spe-

[2] One of the witnesses who refused to give a voice exemplar was Charles Bishop Smith. He was originally listed with Dionisio as a respondent in this case; the petition was, however, dismissed as to him by the government in October 1971, after he had been indicted by the grand jury.

[3] "D. App." references are to the joint Appendix in No. 71–229, on file with the Clerk of this Court.

cial February 1971 Grand Jury expired (D. App. 14–16, 18).[4]

The court of appeals reversed (Dionisio Pet. App. A 12–19). It rejected the contentions that the grand jury's request for voice exemplars violated rights under the Fifth and Sixth Amendments (Dionisio Pet. App. A 14), but it concluded that to compel compliance with the request would violate Fourth Amendment rights. In the court's view the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars" (Dionisio Pet. App. A 17). It therefore held that this "seizure" of physical evidence violated the "standard of reasonableness" required by the Fourth Amendment, under *Davis* v. *Mississippi*, 394 U.S. 721. Equating the procedure followed by the grand jury in this case to the police arrests involved in *Davis*, the court stated (Dionisio Pet. App. A 18–19): "The dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*."

[4] The life of the special grand jury involved here is 18 months, but it may be extended an additional 18 months under 18 U.S.C. 3333(a). On July 17, 1972, the life of the Special February 1971 Grand Jury was extended for an additional six months.

The Special September 1971 Grand Jury was convened in the Northern District of Illinois for the purpose of investigating thefts of interstate shipments that were taking place in that part of the state. During its investigation, it received as exhibits certain writings which were relevant to the offenses under consideration.

The grand jury then subpoenaed respondent Mara and sought to obtain from him handwriting and printing exemplars for comparison with these exhibits. Mara appeared before the grand jury on September 23 and 28, 1971. He was each time informed that he was a potential defendant in the matter being investigated, and was then directed to furnish the exemplars. On both occasions, he refused to do so.

The government then filed in the United States District Court for the Northern District of Illinois a petition to compel Mara to furnish handwriting and printing exemplars to the grand jury. The petition stated that the exemplars were "essential and necessary" to the grand jury's investigation (M. App. 3);[5] it was accompanied by an affidavit of an FBI agent, submitted *in camera,* which set forth the basis for seeking the exemplars from Mara. The district court ordered Mara to provide the exemplars (Mara Pet. App. B 18–19). When he continued to refuse to do so, he was adjudged to be in civil contempt and committed to prison until he obeyed the court order

[5] "M. App." references are to the Supreme Court Appendix in No. 71–850 on file with the Clerk of this Court.

or until the term of Special September 1971 Grand Jury expired (Mara Pet. App. C 20–21).[6]

The court of appeals reversed (Mara Pet. App. A 9–17). Relying on its earlier opinion in *Dionisio, supra*, it held (*id.* at 10–11) that "compelling * * * [a grand jury witness] to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its [the Fourth Amendment's] reasonableness requirement * * *."

The court then turned to "the procedure the Government must follow in attempting to demonstrate that the proposed seizure of the exemplars is reasonable" and "the content of the reasonableness showing necessary" (*id.* at 11). It rejected the *in camera* procedure used in the district court, and ruled that "the Government must show reasonableness by presenting its affidavit [or other proof] in open court, in order that * * * [the witness] may contest its sufficiency" (*ibid.*). With regard to "[t]he substantive showing that the Government must make," the court held (*id.* at 15–16) that proof was required "that the grand jury investigation was properly authorized * * * that the information sought is relevant to the inquiry, and that * * * the grand jury process is not being abused." In addition, it stated (*id.* at 16) that in these circumstances the government must demonstrate "why satisfactory * * * exemplars cannot be obtained from other sources without grand

[6] The court of appeals released Mara on bail pending his appeal to that court (Mara Pet. App. D 22–23).

jury compulsion"; it is, the court concluded (*ibid.*), "an abuse of the grand jury process for the Government to impose on that body to perform investigative work that can be, and heretofore has been, successfully accomplished by the regular investigative agencies of Government."

The affidavit of the FBI agent that was before the district court was considered by the court of appeals to lack sufficient detail to establish the necessary connection between the identification evidence sought and the purpose to be served (*ibid.*).

SUMMARY OF ARGUMENT

It is well settled that the taking of voice and handwriting exemplars from an individual does not require him to produce evidence of a testimonial nature and therefore does not violate the Fifth Amendment privilege against self-incrimination. Our position in these cases is that the obtaining of similar evidence through the grand jury subpoena process also does not amount to the type of governmental intrusion on individual privacy against which the Fourth Amendment affords protection.

A person's voice and handwriting, much the same as his facial features, are merely identifying physical characteristics which are constantly exposed to public observation. They are not personal characteristics that an individual "seeks to preserve as private" (*Katz* v. *United States*, 389 U.S. 347, 351), or with respect to which he can claim a reasonable "expectation of privacy" (*Terry* v. *Ohio*, 392 U.S. 1, 9). Hence, requir-

ing a grand jury witness to submit to a voice test or to furnish a handwriting specimen does not constitute an unreasonable search or seizure in violation of the Fourth Amendment. There is no intrusion into the body; the witness' private life is not in any way invaded; nor is there involved any disclosure of personal thoughts, opinions or privately-held information.

Moreover, the fact that here the voice and handwriting exemplars were sought through the grand jury process gives rise to no Fourth Amendment claim. It has long been recognized that the calling of a person before a grand jury does not constitute a seizure of the person, as does, for example, a police detention. Every citizen has a duty to appear and give evidence when properly summoned. The fact that the performance of this duty might cause some inconvenience or result in a marginal interference with an individual's private life plainly does not excuse him from complying with a grand jury subpoena on Fourth Amendment grounds.

This is not to say that the constitution affords no protection against a clear abuse of the grand jury process, such as where a subpoena is issued that is too sweeping in scope and undiscriminating in character. But that is not the situation in these cases. Here all that was requested was specific exemplar evidence for comparison with designated material already in the grand jury's possession; it was sought solely for identification purposes. Such a request does not run afoul of the Fourth Amendment.

The court below therefore erred in holding that, before grand jury witnesses can be required to furnish specimens of their voice and handwriting, the government must make a preliminary showing of "reasonableness" in an open, adversary proceeding. This Court has repeatedly declined to permit such litigious interruptions of the grand jury process. To impose such a requirement here on the basis of so tenuous a claim of privacy as these respondents have raised would provide virtually every grand jury witness with an opportunity to impede the investigative process any time he is subpoenaed to testify or to bring in books and records, for his very appearance necessarily involves some interference with his private life. The Fourth Amendment does not demand or authorize judicial scrutiny of this sort.

Even assuming *arguendo,* however, that some preliminary showing of "reasonableness" must be made before grand jury subpoenas seeking exemplar evidence can be enforced, the court of appeals erred in requiring that the government must meet its burden in an open, adversary proceeding. It is our submission that the government should be permitted to show that such a grand jury request satisfies Fourth Amendment standards in an *ex parte, in camera* proceeding before an independent magistrate, as is the customary procedure in analogous Fourth Amendment situations where a search warrant or an arrest warrant is sought.

ARGUMENT

I

INTRODUCTION

The central question before the Court in these two cases relates solely to the Fourth Amendment right of witnesses before a grand jury to withhold from that investigative body exemplar evidence sought purely for identification purposes. While an additional objection to providing the grand jury with exemplars was made in both cases under the Fifth Amendment, that contention was rejected by the court of appeals.[7] Since the Fifth Amendment ruling of the court below bears directly on the formulation of the Fourth Amendment issue to be decided here, we refer at the outset to that aspect of these cases.

This Court's holding in *Gilbert* v. *California,* 388 U.S. 263, makes it clear that the taking under compulsion of exemplar evidence of the sort involved here does not violate the privilege against self-incrimination. *Gilbert* involved handwriting exemplars taken by an FBI agent from an accused in custody and admitted into evidence at trial. The Court there stated (388 U.S. at 266–267): "One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication

[7] See Dionisio Pet. App. A 14, and Mara Pet. App. A 10, n. 1. Similarly, the court below rejected respondents' arguments premised on a right to counsel under the Sixth Amendment.

within the cover of the [Fifth Amendment] privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection."

The same point was made in *United States* v. *Wade*, 388 U.S. 218, where the Court ruled that it was proper to compel a defendant in a lineup, who was in custody under an indictment for bank robbery, to speak the words allegedly uttered by the robber during the holdup.[8] Rejecting the contention that such a lineup procedure violated the privilege against self-incrimination, the Court stated in *Wade, supra*, 388 U.S. at 222–223: "It is compulsion of the accused to exhibit characteristics, not compulsion to disclose any knowledge he might have. * * * [C]ompelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."

The *Gilbert* and *Wade* decisions thus lay to rest any claim that the obtaining of exemplars, whether they be handwriting or voice, by compulsory process in some way implicates the Fifth Amendment. And see *Schmerber* v. *California*, 384 U.S. 757, 764; cf.

[8] The Court held that because the lineup was conducted without notice to, and outside the presence of, the accused's attorney, the accused was deprived of his Sixth Amendment right to counsel.

Kirby v. *Illinois*, No. 70–5061, decided June 7, 1972.[9] Given this, the court of appeals' equation of the handwriting and voice exemplars involved here with private books and papers (Dionisio Pet. App. A 16) for the purpose of resolving the present Fourth Amendment issue misconceives the essential nature of the question now before the Court. For, whatever "light" the Self-Incrimination Clause might in other contexts throw "on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment" (*Boyd* v. *United States*, 116 U.S. 616, 633),[10] in the present context Fifth Amendment considerations do not come into play. See *United States* v. *Doe*, 457 F. 2d 895, 897 (C.A. 2), pending on petition for certiorari, No. 71–6522. At issue here is whether a grand jury subpoena to produce exemplars of the variety considered in *Gilbert* and *Wade* is the kind of governmental intrusion on privacy against which the Fourth Amendment alone affords protection, there being no violation of the Self-Incrimination Clause. For the reasons set forth below, we think not.

[9] The courts of appeals agree. See, *e.g.*, *United States* v. *Doe* (*Devlin*), 405 F. 2d 436, 438–439 (C.A. 2); *United States* v. *Webster*, 422 F. 2d 290 (C.A. 4); *Newsom* v. *United States*, 402 F. 2d 835, 836 (C.A. 5); *Fraser* v. *United States*, 452 F. 2d 616, 619 n. 5 (C.A. 7); *Abernathy* v. *United States*, 402 F. 2d 582, 584–585 (C.A. 8); *Gregory* v. *United States*, 391 F. 2d 281 (C.A. 9), certiorari denied, 393 U.S. 870; *Green* v. *United States*, 386 F. 2d 953, 956–957 (C.A. 10).

[10] We note in passing that it has been observed that "[t]he Supreme Court has to a large extent recanted that part of the *Boyd* dicta which would apply the Fourth Amendment to an order to produce a document, properly a Fifth Amendment concern." 8 Wigmore, *Evidence* § 2264, at 381–384, n. 4 (McNaughton rev. 1961).

II

THE GRAND JURY'S USE OF ITS SUBPOENA POWER TO COMPEL WITNESSES TO APPEAR AND FURNISH VOICE AND HANDWRITING EXEMPLARS FOR PURPOSES OF IDENTIFICATION DOES NOT VIOLATE THE FOURTH AMENDMENT

A. THE FOURTH AMENDMENT PROTECTION

The Fourth Amendment guarantees that all people shall "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *." Its essential purpose is to protect individual privacy. As stated in *Terry* v. *Ohio, supra,* 392 U.S. at 9, "wherever an individual may harbor a reasonable 'expectation of privacy', * * * he is entitled to be free from unreasonable governmental intrusion." The nature of the protected right was explained in *Katz* v. *United States, supra,* 389 U.S. at 351, as follows:

> * * * the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * *

It is our position that voice and handwriting exemplars may be taken from individuals by compulsory process without invading any reasonable expectation of privacy. The tone and manner of one's speech and the way in which a person signs his name are identifying physical characteristics that are "constantly exposed to public observation" (*People* v.

Ellis, 65 Cal. 2d 529, 535 (Cal. Sup. Ct.; Traynor, C.J.)). By their very nature, they are no more private to the individual than his facial features or identifying marks on his body, such as scars or birthmarks, that normally remain in plain view. As the Second Circuit recently stated in *United States* v. *Doe*, *supra*, 457 F. 2d at 898: "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection, *Katz* v. *United States*, *supra*, the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear." [11]

Precisely because these identifying characteristics are on constant public display, compelling an individual by grand jury subpoena to furnish voice or handwriting specimens involves, we submit, no invasion of the privacy of his "person." [12] Unlike the blood sample involved in *Schmerber* v. *California*, *supra*,

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[11] This Court's recent decision in *United States* v. *United States District Court for the Eastern District of Michigan*, No. 70–153, decided June 19, 1972, was of course concerned with Fourth Amendment considerations relating to the content of speech; the Fourth Amendment issue in these cases relating to voice and handwriting exemplars sought solely for identification purposes was not involved there.

[12] We agree with the Second Circuit that "[e]xemplars, whether handwriting or voice, if covered at all [by the Fourth Amendment], must be considered elements of 'persons' rather than 'houses, papers and effects.'" *United States* v. *Doe*, *supra*, 457 F. 2d at 897.

for example, the exemplars sought here contemplate no "intrusions into the body" (384 U.S. at 768). Moreover, as this Court observed in a somewhat related context involving fingerprinting, there is "none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis* v. *Mississippi,* 394 U.S. 721, 727. Nor are these respondents being subjected to the "severe, though brief, intrusion upon cherished personal security" and the "annoying, frightening, and perhaps humiliating experience" involved in even a limited police search (*Terry* v. *Ohio, supra,* 392 U.S. at 24–25).

The voice test to which the grand jury has required Dionisio to submit for comparison with recordings of lawful court-ordered wiretaps, and the handwriting exemplars sought from Mara for comparison with other writings properly before the grand jury, are no more repugnant to the Fourth Amendment than is the "requiring [of] a grand jury witness to remove a mask, in order to permit comparison with surveillance photographs * * *" (*United States* v. *Doe, supra,* 457 F. 2d at 898). In none of these situations does the compelled disclosure of identifying physical characteristics invade a "reasonable expectation of privacy" in the *Terry* or *Katz* sense. Indeed, this is the clear implication of this Court's decisions in *Gilbert* and *Wade* (see pp. 11–13, *supra*). The fact that the defendants in those cases were lawfully in custody does not change the nature of the right involved. To the contrary, if nontestimonial exemplars can be compelled from a person charged with a

crime, there is no reason why the same identifying evidence cannot be demanded from one not yet charged in any sense, but only suspected of being involved in the matters under grand jury investigation—a suspicion, we add, which could well be dissipated by the exemplars sought.[13] "There is no basis," as the Second Circuit observed in *United States* v. *Doe, supra,* 457 F. 2d at 898–899, "for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers."

B. THE GRAND JURY SUBPOENA PROCESS

The fact that one's voice and handwriting are not themselves within the area of protected privacy that is sheltered from unreasonable government intrusions does not end the inquiry. For if the effort to obtain exemplars of those identifying physical characteristics is conducted in a manner that otherwise improperly invades "a reasonable expectation of privacy," whether it be an impermissible interference with person (see *Davis* v. *Mississippi, supra*) or

[13] As the Second Circuit noted in *United States* v. *Doe, supra,* 457 F. 2d at 901, "there may well be instances where the Government's purpose in seeking handwriting exemplars is not to show that the witness has committed a crime but rather to show that he has not, *e.g.*, when the true suspect says that incriminating writings were the work of the witness rather than himself." In such instances, the court of appeals pointed out (*id.* at 901, n. 3), "[w]hile normally such a witness would happily comply, cases are not unknown where an innocent third party has accepted 'suggestions' that he 'take the rap.'"

property (see *Hale* v. *Henkel,* 201 U.S. 43), then compelling the production of such "tainted" evidence still might run afoul of the Fourth Amendment. But such, we submit, is not the situation here.

In both of these cases, the exemplars were sought from the respondents by a grand jury subpoena that requested only the identification evidence now under consideration. The court below, placing heavy reliance on *Davis* v. *Mississippi, supra,* equated the compulsory process used here with the detention procedure that this Court found in *Davis* to violate the Fourth Amendment and thus to invalidate the use at trial of Davis' fingerprints taken while he was unlawfully detained (see Dionisio Pet. App. A 18–19).[14] But this analysis misconceives the traditional nature and function of grand juries in this country. As pointed out in *United States* v. *Doe, supra,* 457 F. 2d at 898:

> The distinction between the compulsion exerted by a subpoena and detention by law enforcement officers is far from being a mere matter of words. The latter is abrupt, is effected with force or the threat of it and often in de-

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[14] The fingerprints involved in *Davis* were obtained during an extended involuntary detention of 24 youths taken into custody in a ten-day period in connection with a police investigation of a rape. In holding such police procedures to violate the Fourth Amendment, the Court stated (394 U.S. at 728): "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." And see *United States* v. *Greene,* 429 F. 2d 193, 197, n. 7 (C.A. D.C.).

> meaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.

The calling of a person before a grand jury, moreover, does not constitute a seizure of the person, as does police detention. Compare *Davis* v. *Mississippi, supra,* 394 U.S. at 726–727; *Terry* v. *Ohio, supra.* It long has been recognized that appearing and giving evidence before a grand jury "are public duties which every person * * * is bound to perform upon being properly summoned." *Blair* v. *United States,* 250 U.S. 273, 281; *United States* v. *Bryan,* 339 U.S. 323, 331; and see *Kastigar* v. *United States,* No. 70–117, decided May 22, 1972. The right of each citizen to "a reasonable expectation of privacy" does not excuse him from these obligations, notwithstanding that it may "interfere with [his] ability to do exactly what he does or does not please." *United States* v. *Doe, supra,* 457 F. 2d at 897. And this is so even if he is himself suspected of committing the offenses under investigation. See *e.g., Cobbledick* v. *United States,* 309 U.S. 323, 325; *United States* v. *Winter,* 348 F. 2d 204, 207–208 (C.A. 2), certiorari denied, 382 U.S. 955.

As this Court recently stated in *Branzburg* v. *Hayes,* No. 70–85, decided June 29, 1972, slip op. 16: "Citizens generally are not constitutionally immune from grand jury subpoenas." Just as *Branzburg* con-

firmed that there is no privilege in the First Amendment relieving newsmen from the long standing duties to attend and testify, so too we believe that the Fourth Amendment provides no such haven for these respondents. As the court below correctly pointed out in *Fraser* v. *United States*, 452 F. 2d 616, 620: "A grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied." [15]

To be sure, this Court observed in *Hale* v. *Henkel*, 201 U.S. 43, 76, that a grand jury subpoena *duces tecum*—requiring the production of documentary evidence of a testimonial nature—which by its terms sweeps too broadly "may constitute an unreasonable search and seizure within the Fourth Amendment." There, however, the Fourth Amendment violation derived essentially from the Court's reluctance to compel a wholesale disclosure of private thoughts and opinions, which is condemned by the Fifth Amendment. And it was even suggested in that case (201 U.S. at 73) that the result might well have been different if, as here, the subpoena had posed no threat to the privilege against self-incrimination. And see *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 196, 202–208; *United States* v. *Doe*, *supra*, 457 F. 2d at 900.

In any event, the grand jury subpoenas involved in these cases do not suffer from overbreadth, whatever

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[15] As we pointed out earlier (*supra*, pp. 11–13), Fifth Amendment considerations are not involved in these cases.

might be the constitutional infirmity resulting therefrom. As we earlier stated, each called only for production of specific exemplar evidence for comparison with lawfully obtained recordings (*Dionisio*) and writings (*Mara*) already in the grand jury's possession. The court below labelled such requests, "general fishing expeditions into the private affairs of witnesses" (Dionisio Pet. App. A 16). But that characterization is accurate only in the sense that every grand jury proceeding is a "general fishing expedition," as a result of that body's broad mission to ferret out the facts without knowing in advance what is involved or where its investigation will lead. This Court recently so stated in *Branzburg* v. *Hayes*, *supra*, slip op. 21–22:

> Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, [the grand jury's] investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair* v. *United States*, 250 U.S. 273, 282. Hence the grand jury's authority to subpoena witnesses is not only historic * * * but essential to its task.

The issuance of these narrowly-drawn subpoenas was a proper exercise of this broad investigative authority. It is the essence of the grand jury proceeding

to question and obtain evidence from a witness in circumstances that would not permit detaining him under the traditional probable cause standard. In this respect, of course, the grand jury's powers exceed those of most investigatory bodies, including the police; but this is necessarily so in view of the fact that the ultimate purpose of the grand jury is to determine if probable cause exists. See *Hale* v. *Henkel, supra,* 201 U.S. at 65; *Hendricks* v. *United States,* 223 U.S. 178, 184. Hence, the absence of probable cause is to be expected, and does not make unreasonable the action ordering the exemplars here.

We disagree with the court below (Dionisio Pet. App. A 19) that the fact that the *Dionisio* grand jury subpoenaed approximately twenty persons to furnish voice exemplars is cause for complaint. Given the nature of the illicit gambling business, it is not unlikely that many people were involved in the matter under investigation. Whether the grand jury was seeking to identify a number of voices, or had called twenty people in an effort to identify one voice, is not shown in the record. Whichever is the case, however, the number of people involved is not, by itself, determinative here.

Insofar as a right of privacy can be founded on the Fourth Amendment, it is a personal right, and turns on the oppressiveness of the action complained of to the individual. *Alderman* v. *United States,* 394 U.S. 165, 174; *Wong Sun* v. *United States,* 371 U.S. 471. If Dionisio or Mara had been repeatedly ordered to appear before a grand jury and give voice or handwrit-

ing exemplars, that might involve undue oppression that would warrant constitutional protection. See *Branzburg* v. *Hayes, supra,* slip op. 1–3 (Powell, J., concurring). But nothing of the sort happened in these cases; each respondent was asked only to give a single exemplar at a reasonable time and place. The Fourth Amendment plainly does not relieve them of their duty to do so (see pp. 19–20, *supra*) simply because the grand jury also subpoenaed similar evidence from other individuals.

III

THE COURT BELOW ERRED IN HOLDING THAT THE FOURTH AMENDMENT REQUIRES IN THE PRESENT CIRCUMSTANCES THAT THE GOVERNMENT MAKE A PRELIMINARY SHOWING OF "REASONABLENESS" IN AN OPEN, ADVERSARY PROCEEDING

A. NO PRELIMINARY SHOWING OF REASONABLENESS SHOULD BE REQUIRED

The holding of the court below in each of these cases requires that the government, as a condition to the grand jury's receipt of the voice and handwriting exemplars, first establish in an open, adversary proceeding the "reasonableness" of the subpoenas issued to these witnesses. The imposition of any such requirement is, we submit, an unwarranted departure from existing law.

As we earlier indicated, it has long been the function of the grand jury, both in this country and in England, to conduct a "grand inquest, * * * the scope of whose inquiries is not to be limited narrowly by ques-

tions of propriety or forecasts of the probable result of the investigation." *Blair* v. *United States, supra,* 250 U.S. at 282. Its task "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone,* 429 F. 2d 138, 140 (C.A. 2). As this Court stated in *Wood* v. *Georgia,* 370 U.S. 375, 392, "society's interest is best served by a thorough and extensive investigation." See also *Hannah* v. *Larche,* 363 U.S. 420, 499 (Douglas, J., dissenting). And this includes the following up of "tips, rumors, evidence proferred by the prosecutor, or the personal knowledge of the grand jurors." *Branzburg* v. *Hayes, supra,* slip op. 36.

This Court has repeatedly declined to stop the grand jury's "examination of witnesses * * * until a basis is laid by an indictment formally preferred * * *" (*Hale* v. *Henkel, supra,* 201 U.S. at 65). It stated in *Blair* v. *United States, supra,* 250 U.S. at 282, that the witness "is not entitled to set limits to the investigation that the grand jury may conduct." Scrutiny of the basis, scope or nature of a particular inquisition has been judiciously avoided. See *Costello* v. *United States,* 350 U.S. 359; *Holt* v. *United States,* 218 U.S. 245. Indeed, last Term in *Branzburg* v. *Hayes, supra,* this Court rejected an effort by the media to interject into the grand jury process on First Amendment grounds a type of preliminary hearing similar to the one required by the court of appeals here.[16]

[16] In *Branzburg*, the preliminary government showing that was proposed was (1) "that there is probable cause to believe

There is, we submit, no more reason in these cases to require that the government litigate the question of "reasonableness" before a subpoena seeking voice and handwriting exemplars can be enforced.[17] Such litigious interruptions of the grand jury process have long been discouraged by this Court. Compare *Cobbledick* v. *United States*, 309 U.S. 323, 325; *DiBella* v. *United States*, 369 U.S. 121; *United States* v. *Ryan*, 402 U.S. 530. Indeed, if inroads on this "acquired * * * independence" (*Costello* v. *United States*, *supra*, 350 U.S. at 362) of grand juries are now to be permitted on the basis of so tenuous a claim of invasion of privacy as is involved here, virtually every grand jury witness will be able to impede the investigative process any time he is subpoenaed to testify or to bring in books and records, for his very

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that the newsman has information which is clearly relevant to a specific probable violation of law"; (2) "that the information sought cannot be obtained by alternative means less destructive of First Amendment rights"; (3) that there is "a compelling and overriding interest in the information." *Branzburg* v. *Hayes*, *supra*, slip op. 19 (Stewart, J., dissenting).

In *Mara*, the court below required that the government make a preliminary showing (1) "that the information sought is relevant to the inquiry"; (2) that "satisfactory * * * exemplars cannot be obtained from other sources without grand jury compulsion," and why; (3) "that the grand jury's request for exemplars is 'adequate, but not excessive, for the purposes of the relevant inquiry,'" that is, "that the grand jury process is not being abused." See Mara Pet. App. A 15–16.

[17] The proposed new Rule 41.1, Fed.R.Crim.P., does not contemplate that the government must make a preliminary showing before a grand jury witness can be required to furnish exemplar evidence. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 52 F.R.D. 409, 462 (1971). The proposed rule "provides a procedure by

appearance necessarily involves some marginal interference with his private life. We do not believe that the Fourth Amendment demands or authorizes judicial scrutiny of this sort. As the Second Circuit stated in *United States* v. *Doe, supra,* 457 F. 2d at 899–900:

> In order for the grand jury to function, it must have the cooperation of citizens in producing evidence, and of doing that quickly, subject, of course, to the limits imposed by the Fifth Amendment privilege. The safeguards built into the grand jury system, such as enforced secrecy and use of court process rather than the constable's intruding hand as a means of gathering evidence, severely limit the intrusions into personal security which are likely to occur outside the grand jury process. * * * Apart from [an investigation so sweeping in scope and undiscriminating in character as to offend other basic constitutional precepts], when the grand jury has engaged in neither a seizure nor a search, there is no justification for a court's imposing even so apparently modest a requirement as a showing of "reasonableness"—with the delay in the functioning of the grand jury which that would inevitably entail.

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which a federal magistrate may issue an order authorizing a nontestimonial identification procedure" by law enforcement officers (52 F.R.D. at 467). But, as the Advisory Committee Note following the rule indicates, citing *United States* v. *Doe (Berlin), supra:* "Compelling a suspect to submit to a nontestimonial identification procedure has been sustained when it is accomplished by means of a grand jury subpoena." 52 F.R.D. at 469.

B. AT ALL EVENTS, THE PRELIMINARY HEARING SHOULD NOT BE AN OPEN, ADVERSARY ONE

Even assuming *arguendo* that a grand jury request for exemplar evidence must be accompanied by some showing of "reasonableness" before it can be enforced, however, the court of appeals erred by holding in *Mara* that the preliminary showing must be made in an open, adversary proceeding.[18] We submit that the government, if required to meet any burden at all, should be permitted to show that a grand jury request satisfies Fourth Amendment standards in an *ex parte, in camera* proceeding before an independent magistrate.

This procedure will, of course, safeguard the privacy rights of grand jury witnesses in the present context, such as they are, as effectively as it protects similar rights of other citizens in analogous Fourth Amendment situations where a search warrant or an arrest warrant is involved. At the same time, however, it will not, in contrast to the full-blown adversary hearing required by the court below, cause the type of "undue interruption [to] the inquiry instituted by grand jury" (*Cobbledick* v. *United States*, *supra*, 309 U.S. at 327) that this Court, as we earlier indi-

[18] In *Dionisio*, the court below did not have to consider the type of proceeding in which the government would show "reasonableness," since there was no effort in that case to make a preliminary showing. If therefore this Court should determine that some kind of showing is necessary, it would be appropriate to remand *Dionisio* to the district court to permit the government to satisfy whatever standard this Court might announce.

cated, has been so careful to guard against. Nor will it compromise the "long-established policy" of grand jury secrecy (*United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681) that has long been recognized as an "indispensable" (*United States* v. *Johnson*, 319 U.S. 503, 513) prerequisite to that body's investigative process. See also *United States* v. *Proctor & Gamble Co., supra*, 356 U.S. at 682. Given the very limited—indeed, in our view, negligible—invasion of privacy involved in taking voice and handwriting exemplars, on the one hand, and the inevitable lengthy delays in, and breaches of the secrecy of, grand jury investigations that would result from requiring that the preliminary showing of "reasonableness" be open and adversary, on the other, we submit that, if a "hearing" requirement is now to be interjected into the grand jury process, the *ex parte*, closed proceeding that we propose is an appropriate accommodation of these conflicting interests.

This accommodation is not inconsistent with *Alderman* v. *United States*, 394 U.S. 165, on which the court below placed heavy reliance. In *Alderman*, the issue concerned the exclusion of evidence already obtained that was the product of an admittedly unlawful search. Here, by contrast, the basic question is whether the grand jury's initial request for certain evidence is

"reasonable" when measured by Fourth Amendment standards. That threshold determination, we submit, may in the present context, just as it is in other contexts, be properly decided by an independent magistrate in *ex parte, in camera* proceedings.[19]

CONCLUSION

For the reasons stated, the judgment of the court of appeals in these cases should be reversed and the district court's orders adjudging respondents in civil contempt should be reinstated. In the event that this Court should determine, however, that some preliminary showing of "reasonableness" is required before these grand jury witnesses must furnish voice and handwriting exemplars, the cases should be remanded

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[19] The preliminary showing of reasonableness made by the government in *Mara*, while in our view not necessary, was, we believe, adequate to meet Fourth Amendment standards. The affidavit submitted *in camera* to the district court—which is on file with the Clerk of this Court—states the nature of the unlawful activities under investigation by the grand jury, the origin and character of the writings already introduced as grand jury exhibits, and the suspected relationship of respondent to those writings that led to subpoenaing from him the handwriting exemplars. This, we believe, would suffice to meet whatever burden, if any, might be imposed on the government to make a preliminary showing.

to the district court for further proceedings in accordance with this Court's opinion.

Respectfuly submitted.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-850

UNITED STATES OF AMERICA,
Petitioner,

v.

RICHARD J. MARA,
Witness Before the Special
September 1971 Grand Jury,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE FEDERAL COMMUNITY DEFENDER ORGANIZATION OF THE LEGAL AID SOCIETY OF NEW YORK, *AMICUS CURIAE*

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Interest of *Amicus**

Pursuant to 18 U.S.C. §§3006A (a)(2) and (h)(2)(B) (1971), The Legal Aid Society of New York was desig-

* Letters of Consent have been obtained from the Solicitor General of the United States and counsel for respondent, and are on file with the Clerk of the Court.

nated Community Defender Organization for the United States District Courts for the Southern and Eastern Districts of New York and for the United States Court of Appeals for the Second Circuit in cases arising in such District Courts. In that capacity, The Legal Aid Society represented Cynthia B. Schwartz in the proceedings brought by the United States seeking a judgment of civil contempt resulting from a refusal by Mrs. Schwartz to supply a handwriting exemplar requested by a grand jury of the Southern District of New York.

Mrs. Schwartz was adjudged to be in civil contempt and ordered to be imprisoned for thirty days or until such time as she complied with the direction of the foreman of the grand jury. Stays of the execution of sentence were granted successively by the District Court and the United States Court of Appeals for the Second Circuit. On March 28, 1972, the Court of Appeals affirmed the order adjudging Mrs. Schwartz to be guilty of civil contempt (457 F.2d 895).

A stay of execution of sentence was ordered by the Court on May 31, 1972 (Application No. A-926), and a petition for writ of certiorari was filed on April 17, 1972 on behalf of Mrs. Schwartz (Doc. No. 71-6522).

The issue presented by the petition filed on behalf of Mrs. Schwartz is identical to that in this case, and it is the purpose of this brief to assist the respondent in demonstrating that the Fourth Amendment applies to grand jury demands for handwriting exemplars.

Summary of Argument

Grand jury demands for the creation and production of identifying physical characteristics which are not in plain view are covered by the Fourth Amendment protection against unreasonable searches and seizures. The government's intrusion need not be a physical one; compulsion is a condemned intrusion when it is the method by which the government seeks to obtain the evidence. The constitutional protection does not depend upon whether the witness is properly called before the grand jury, but on whether the characteristic is protected. Further, the power of the grand jury to obtain evidence is not unlimited. A witness before the grand jury is protected by the Fifth Amendment. The government cites no authority for not affording Fourth Amendment protections to those witnesses and none articulating an unlimited power in the grand jury to secure nontestimonial evidence. A balancing of the function of the grand jury with the substantial right to be free of governmental intrusion produces an appropriate probable cause standard to be met by the government which would not interfere with the substantive scope of grand jury investigations and its traditional means of securing information and would prevent circumvention of the Fourth Amendment.

ARGUMENT

The Fourth Amendment protects identifying physical characteristics not in plain view from intrusions made by the grand jury and requires that the demand for the production of such characteristics be based upon an appropriate showing of probable cause.

I.

The Fourth Amendment guarantee of security to both persons and effects protects against government compulsion to produce handwriting exemplars. The individual's right against unreasonable intrusion of his person by government officials depends not only upon the nature of the intrusion, but upon the nature of the characteristic intruded upon. There are qualities of the "person" that cannot be searched or seized by the physical act of another person, as one would search or seize a house, paper, or effect, but must be obtained by compelling the individual to act, thus forcing him to create an effect for the government to seize, such as handwriting exemplars.* Thus, the unreasonable intrusion is the compulsion of otherwise voluntary cognitive creative behavior and the seizure of the effect produced by such behavior.

The government argues, from *United States* v. *Doe* (*Schwartz*), 457 F.2d 895, 898-9 (2d Cir. 1972), *cert. pending,* No. 71-6552, that the daily use of handwriting to communicate exposes that characteristic to the public at large so that it is no longer private (government brief at 15), and is thus not an item about which the individual can have a

* Production of evidence in this context is thus something much more than bringing it before the grand jury. It is the actual creation.

reasonable expectation of privacy. *See Katz* v. *United States,* 389 U.S. 347, 351 (1967). This is error. Both the government and the Second Circuit misapply to personal physical characteristics the language of *Katz* that

> * * * The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. * * * 389 U.S. at 351.

What *Katz* reiterates is the "plain view" principle. While government officials who are properly in a home or office can seize what is in plain view [*Coolidge* v. *New Hampshire,* 403 U.S. 464-72 (1971); *Harris* v. *United States,* 390 U.S. 234 (1968); see *Mancusi* v. *De Forte,* 392 U.S. 364 (1968)], even if they are in a public place, items not in view cannot be taken. Thus, in *Katz,* a conversation was held to be protected by the Fourth Amendment because the individual, although in a public telephone booth, intended that his conversation not be heard by others: it was not in plain "hearing." The application of *Katz* to the facts in *Terry* v. *Ohio,* 392 U.S. 1 (1968), similarly rested on a "plain view" principle. Thus, the Court held that, although an individual was on a public street, he was protected against unreasonable intrusion upon his person for objects not observable.

Identifying physical characteristics are similarly entitled to Fourth Amendment protection when they must be produced or created with the cooperation of the person in order to be in public view. *United States* v. *Harris,* 453 F.2d 1317, 1320 (8th Cir. 1972). Although handwriting is an often-used means of communicating, a grand jury

demand that a person make an exemplar on the occasion of an appearance clearly demonstrates that it is not something in plain view. Further, the very need of the government for the exemplar to make a comparison with writings it may already have demonstrates that the authorship of the exemplar is, indeed, very private.

The analogy made by both the government (brief at 15) and the court of appeals in *United States* v. *Doe* (*Schwartz*), *supra,* 457 F.2d at 898, of handwriting with facial features and visible scars or birthmarks underscores the point made here. Facial features are normally in plain view, and no cooperation or compulsion is needed to put them in such a state of observability.

Handwriting exemplars are like blood and fingerprints, both of which are protected against unreasonable intrusions. *Schmerber* v. *United States,* 384 U.S. 757 (1966); *Davis* v. *Mississippi,* 394 U.S. 721 (1969). Blood and fingerprints, like exemplars, are often exposed or available to the public. Yet, *Davis* v. *Mississippi, supra,* 394 U.S. 721, established the applicability of the Fourth Amendment to fingerprint samples although fingerprints are generally available identifying characteristics. The decision indicates that fingerprints can be taken without an arrest only if based upon a warrant premised on a showing of reasonableness. While a showing of probable cause to arrest for a crime would probably not be required in such a situation, what is clear from *Davis* is that fingerprints come within the scope of the Fourth Amendment.

Schmerber v. *California, supra,* 384 U.S. 757, similarly establishes that an intrusion by the government to obtain

a physical characteristic comes within the protections of the Fourth Amendment. Furthermore, while a physical intrusion is required to obtain blood, the compulsion exercised to secure handwriting exemplars is no less an intrusion [*United States* v. *Harris, supra,* 453 F. 2d 1317] since compulsion is the kind of intrusion necessary to secure the desired evidence. See *Morton Salt Co.* v. *United States,* 338 U.S. 632, 652 (1950).

II.

In its brief, the government suggests that the grand jury can subpoena non-testimonial evidence free from Fourth Amendment limitations, thus making irrelevant whether handwriting exemplars are covered by the Fourth Amendment (government brief at 19-20, 22 and 24).* As authority for this position, the government cites language from *Branzburg* v. *Hayes,* 33 L. Ed. 2d 626 (1972), and *Blair* v. *United States,* 250 U.S. 273 (1919), referring to the grand jury's broad investigative powers to compel appearance and testimonial evidence.

The government's position fails, however, to recognize the vital distinction between the requirement of appearance before a grand jury and a collateral demand for the production of evidence before that grand jury. While the grand jury admittedly can compel the appearance of any person, an additional demand for evidence is valid only if in accord with constitutional principles. Thus, a demand for testimonial evidence, including books and records, is limited by the Fifth Amendment. *Kastigar* v. *United States,* 33 L. Ed. 2d 212 (1972); *United States* v. *White,*

* The government concedes that the Fourth Amendment applies if a subpoena is overly broad, harassing or oppressive.

322 U.S. 694 (1944).* The restrictions of the Fifth Amendment are applicable to such demands even though the compulsory production of written, as well as oral, testimony is considered essential to the functioning of the grand jury. *Branzburg* v. *Hayes, supra*, 33 L. Ed. 2d 626; *Wilson* v. *United States*, 221 U.S. 361 (1961). There is no reason or judicial precedent for treating Fourth Amendment rights differently.

The government cites nothing that supports its view that, as to the Fourth Amendment, the grand jury is treated differently than other governmental agencies investigating criminal activities. No decision of the Court speaks of an unlimited power to secure non-testimonial evidence, and history provides no precedent for assuming that the grand jury has ever exercised such a power. In fact, prior to the cases now before the Court and several recent decisions of other federal courts,** there appears to be no reported instance of contested grand jury demands for non-testimonial evidence.

The government's proposal, if adopted, would leave the grand jury free to require the production of non-testimonial evidence without complying with the Fourth Amendment, permitting the government to do through the grand jury what it would otherwise be prohibited from doing. There

* Of course, a claim of privilege is not available to corporations or associations, or to individuals in custody of the books and records of such entities, *Curcio* v. *United States*, 354 U.S. 118 (1957); *United States* v. *White, supra*, 322 U.S. 694; *Hale* v. *Henkel*, 201 U.S. 43 (1906), or to those in custody of public records, *Shapiro* v. *United States*, 335 U.S. 1 (1948), or records kept for a public purpose, such as tax records.

** *United States* v. *Doe* (*Schwartz*), *supra*, 457 F.2d 895; *In the Matter of the Grand Jury*: *Riccardi* (Whipple, D.J., D.N.J. 1972).

is no reason for creating such an inroad in the protections afforded by that Amendment.

III.

There remains for consideration the standard required by the Fourth Amendment to seize physical characteristics. The government asserts that no standard should be imposed because it would interfere with the functions of the grand jury. To state the public need for the grand jury process, however, is merely to begin the balancing process required to arrive at the requisite standard. *Terry* v. *Ohio, supra,* 392 U.S. at 24, 27; *Camara* v. *Municipal Court,* 387 U.S. 523, 538-9 (1967).* The public need to have a grand jury "inquire into the existence of possible criminal conduct and to return only well-found indictments" (*Branzburg* v. *Hayes, supra,* 33 L. Ed. 2d at 643) combined with the grand jury's broad powers to obtain testimonial evidence is juxtaposed with the substantial right to be free from governmental intrusion. Balancing these, the standard which should be applied to permit a grand jury to demand production of handwriting exemplars is whether there is probable cause to believe that the handwriting of the witness is connected to the suspected criminal activity under investigation; that the identification procedure will materially aid in the determination of whether the person named committed the offense, and that the evidence is otherwise unavailable. At a minimum, the Court should adopt the standard suggested by the opinion of the court of appeals

* Thus, this case is quite different from *Branzburg* v. *Hayes, supra,* 33 L. Ed. 2d 626, where limits on the grand jury's power to obtain certain types of oral testimony was in issue. Here, the only issue is whether the grand jury's more questionable right to secure non-testimonial evidence can be subject to reasonable limitation.

in this case (Pet. App. A15-16). This standard, requiring a showing that the evidence demanded is relevant to the inquiry and that demand is not excessive, has long been the rule governing administrative subpoenas for corporate information. *Morton Salt Co.* v. *United States, supra,* 338 U.S. at 652-3; *Powell* v. *United States,* 379 U.S. 48 (1964).

Neither standard would interfere with the scope or nature of the investigation, merely with the tangible evidence that could be secured. Challenges to demands for handwriting exemplars are properly raised at the time the demand is made and do not involve the interference with the criminal process that was the subject of concern in *Blue* v. *United States,* 384 U.S. 251 (1966) and *Costello* v. *United States,* 350 U.S. 359 (1956). *Gelbard* v. *United States,* 33 L. Ed. 2d 179 (1972). Further, the proceeding should not be held *in camera* as the government urges. Such proceedings are antagonistic to the adversary system [*United States* v. *United States District Court,* 33 L. Ed. 2d 752, 770 (1972); *Alderman* v. *United States,* 394 U.S. 165, 180-85 (1969)] and are not necessary to protect the grand jury proceeding. As the opinion below makes clear, the affidavit need not contain the names of witnesses before the grand jury or the information obtained from them, but should come from the prosecutor's own investigation. Further, such a proceeding will not deter the grand jury from questioning witnesses, deliberating and voting. Since the witness is advised he is a suspect by the request for the handwriting, the chances that he will flee are not increased by the affidavit. Nor can the witness complain of being embarrassed by the information since he asks that it be revealed. Any danger to the criminal process can be met

by a showing by the government in a particular case of the need for an *in camera ex parte* proceeding.

In essence, the government seeks in this case to circumvent the protections afforded under the Fifth Amendment by urging that nothing in the Fourth Amendment prevents the grand jury from doing what it may not under the Fifth. Thus, the government seeks production of handwriting exemplars knowing that it cannot question the witness about the handwriting samples it already has. Stripped to its basics, the government's argument offers no meaningful precedent and relies on generalizations made in a different context as to the broad powers of the grand jury that have accumulated over the years. This is insufficient to establish the impropriety of a Fourth Amendment protection against a rather unique exercise of grand jury power not found in its history despite its broad power.

Conclusion

For the above stated reasons the judgment below should be affirmed.

Respectfully submitted,

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Of Counsel

No. 71-850

IN THE

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OCTOBER TERM, 1972

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vs.

IN RE SEPTEMBER 1971 GRAND JURY, RICHARD J. MARA, a/k/a RICHARD J. MARASOVICH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF WITNESS-RESPONDENT RICHARD J. MARA

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF WITNESS-RESPONDENT RICHARD J. MARA

QUESTIONS PRESENTED.

1. Whether the Government can compel a witness, by incarceration pursuant to the use of a Grand Jury subpoena, to submit handwriting and printing exemplars, to the Government and force compulsion, based upon an FBI Affidavit submitted *in camera* to a district Court without allowing a witness or counsel to see said affidavit, where the information contained in the affidavit did not emanate from any independent activity before that body.
2. Whether the Fourth and Fifth Amendments forbid such an abuse of the Grand Jury process.

STATEMENT.

The witness was subpoenaed before the September, 1971, Grand Jury. It was not a Special Grand Jury. On September 23, 1971, he appeared pursuant to that subpoena and was directed by the U.S. Attorney to give exemplars to an F.B.I. Agent. He refused and was told to return again on September 28, 1971. On that date he again was directed by the Assistant United States Attorney to give exemplars to an F.B.I. Agent. Again he refused and the Assistant U.S. Attorney directed the foreman of the Grand Jury to instruct the witness to give exemplars to the F.B.I. Agent. The Assistant U.S. Attorney did the directing, not the Grand Jury. No offer was made to the witness to have counsel present should he give exemplars. The Petition seeking compulsion sought the exemplars that the Grand Jury "deems necessary." It did not mention prior exhibits before the Grand Jury or that it had received other exhibits stating only that the witness was a potential defendant and that the exemplars would be used solely as a standard of comparison as to whether the witness is the author of certain writings. The government further represented that for reasons set forth in Affidavits submitted to the Court in camera, the exemplars sought "do not constitute an unreasonable search and seizure under the Fourth Amendment standards. See *In Re Dionisio*, 442 F. 2nd 276, 80 (7 Cir. 1971)".

Appeal was taken pursuant to Title 28 United States Code, Section 1826 and bond was granted pending the appeal. In answer to witness' emergency motion for bond in the 7th Circuit, the government admitted that the Af-

fidavit contains matters based upon suspicion concerning the witness' actions.

The Court of Appeals in a 3-0 decision reversed. In holding that compelling a witness to furnish exemplars is forbidden by the Fourth Amendment unless the government complies with its reasonable requirement, the Court specifically held that the government, in order to justify the reasonableness of a request to furnish exemplars, must show it by presenting its affidavit in open court in order that the witness may contest its sufficiency. "More important, unlike the warrant situation where the accused will have an opportunity to contest the sufficiency of the warrant on a motion to suppress before he may be tried and imprisoned . . ., here failure to allow the witness effectively to oppose the government's petition has resulted in an indefinite incarceration for an unchallengable reason. We cannot condone such manifest unfairness." (id at 13). The Court found that the affidavit did not result from any work before the Grand Jury or independent activity by that body and that it was an abuse of the Grand Jury for the government to impose on that body investigative work properly the function of investigative agencies; therefore the Government must show that exemplars cannot be obtained from other sources without Grand Jury compulsion.

It was a further abuse of the Grand Jury to conduct a fishing expedition under Grand Jury sponsorship with the mere explanation that a witness is a potential defendant. To insure a sufficiently explicit connection between the identification evidence sought and the purpose to be served, a more detailed affidavit must be submitted. The incarceration was unjustified and the contempt order was reversed.

ARGUMENT.

I.

INTRODUCTION.

The central questions in this case are whether the Government, by the abuse of a grand jury, compel a person to give handwriting or printing exemplars to that grand jury in violation of the Fourth Amendment based upon an FBI affidavit which showed informtion, independent of the Grand Jury and which affidavit the government and district court refused to allow the witness to see. Subsidiary, but more important is the jailing of that person without allowing him to see the affidavit to contest it violating the due process clause of the Fifth Amendment. Additionally, whether the exemplars sought were testimonial bringing the self incrimination clause of the Fifth Amendment into play. All of the foregoing dovetail into an abuse of the grand jury process where that body is used to accomplish the foregoing.

For the government to state that what was sought in this case, was solely for identification is to beg the question. This court's holdings in *Gilbert* v. *California*, 388 U.S. 263, did not make clear that the taking of handwriting exemplars does not violate the privilege of self incrimination under the Fifth Amendment in every case. For as this court stated in *Gilbert* (388 U.S. at 266), "A mere handwriting exemplar, in contrast to the *content* of what is written, like the voice or body itself, is an identifying physical characteristic outside its pro-

tection." (emphasis supplied). That is one of the issues here. The government says what is sought is for identification but this witness has never known what he was to give. If content is what the Government sought, that very essential to prove its case, especially where the action of the government is solely based on suspicion, then the Fifth Amendment applies for it discloses the very knowledge that the witness has. In *Gilbert,* no claim was made, as was made here, that the content of the exemplars was testimonial or communicative in matter.

Neither did *United States* v. *Wade,* 388 U.S. 218, make clear, what the government claims it did. *Wade* only said that it reaffirmed that the privilege against self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, 388 U.S. at 221; "It is compulsion of the accused to exhibit his physical characteristic, not compulsion to disclose any knowledge he might have." 388 U.S. at 222. "Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the line up which implicates his privilege." 388 U.S. 223. *Gilbert* and *Wade* do not lay to rest the claim that testimonial or communicative exemplars inplicate the Fifth Amendment. The contrary view seems evident if the exemplars sought are communicative.

Kirby v. *Illinois* ..... U.S. ....., 32 L. Ed. 2d 411, only confirmed the language used in *Schmerber* v. *California,* 384 U.S. 757, that the self-incrimination privilege protects a person from providing the state with evidence of a testimonial or communicative nature. Thusly, here the Fifth Amendment does come into play.

The cases cited by the Government in footnote 9 of its brief are inapposite here. None involved the factual situation here nor have raised the issue here. For if what is sought is selectively germane to the government case, i.e., the content and not the exemplars, the privilege should apply. No dispute would arise if a witness was asked if he signed a document and he invoked the privilege. There should be no reason in logic why the privilege should not apply where a witness is asked to sign a document where content is sought. *United States* v. *Green,* 282 F. Supp. 373, *United States* v. *Irwin,* 322 F. Supp. 701; *United States* v. *Doe,* 405 F. 2nd 436, wherein the Court noted that the *Gilbert* decision did not say what the exemplars there were.

So too, is note 10 inapposite in that while Wigmore did make his observation, he further stated that the *Boyd* dicta has shown inexplicable tenacity in the decisions of this court and of other courts.

Hill v. *Philpott,* 445 F. 2nd 144, and cases cited therein have recanted and laid to rest the Wigmore theory in Section 2264. There the government, by search warrant seized private books and papers. That procedure, the government contended, obviated the Fifth Amendment leaving only the question of the Fourth Amendment. The appellate court rejected the argument, relying on *Boyd* v. *United States,* 116 U.S. 616. It recognized the intertwining of both amendments, cast aside Wigmore and held that whether evidence is testimonial or communicative in nature is the first step in the process in determining whether it may be privileged. The Fourth Amendment question was not reached. The government's premise here is wrong as to the issue involved; as has been

shown above, *Gilbert* and *Wade* do not stand for testimonial or communicative evidence being compelled in violation of the Fifth Amendment privilege of self-incrimination. It is therefore, an issue here and Fifth Amendment considerations as to self-incrimination are involved here.

II.

THE FOURTH AMENDMENT.

The Fourth Amendment guarantees against all unreasonable searches and no warrants shall issue except upon probable cause. No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restrains or interference of others; unless by clear and unquestionable authority of law. *Terry* v. *Ohio,* 392 U.S. at 9.

Here, in its Petition for compulsion, the government stated that the exemplars sought were for comparison, to determine whether the witness authored writings. It admits that what it seeks, it bases on suspicion. It does not have enough probable cause and so it uses a Grand Jury Subpoena. Compulsion is sought, upon refusal, on the basis of an FBI affidavit never disclosed to the witness. The rationale *Davis* v. *Mississippi,* 394 U.S. 721, is applicable here. There, fingerprints were involved. In turning aside the State's argument that detention occurred during an investigatory rather than accusatory stage and did not require probable cause; this court said at 394 U.S. at 726, 727, "But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would

subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrustions be termed 'arrests' or 'investigatory detentions.' We made this explicit only last Term in *Terry* v. *Ohio*, 392 U.S. 1, 19, 20 L. Ed. 2d 889, 904, 88 S. Ct. 1868 (1968), when we rejected 'the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."' (3, 4) Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment." *Davis* does not distinguish between Grand Jury or police actions but directed its teachings to the Fourth Amendment and what that amendment prevented Government from doing. There is no difference between a grand jury subpoena in this context and police investigation. The affidavit in this case, as found by the Seventh Circuit Court of Appeals, does not appear to contain information elicited from complainants and witnesses before the Grand Jury. The government bases its argument on the blanket assertion that the exemplars here sought are physical characteristics.

There should be no distinction between books, papers, records, handwriting or fingerprinting. Whether the argument is made on probable cause or unreasonableness, the Fourth Amendment applies. The Fourth Amendment in part, calls for probable cause. Assuming the Government's position, that the exemplars are non testimonial, the Fourth Amendment requirements for probable cause

must be met. What is attempted here is the issuance of a subpoena by a prosecutor to subvert the Fourth Amendment where a showing of probable cause is the very minimum for justifying the invasion of one's privacy. That minimum was not shown and no warrant was ever issued. The government seeks the exemplars because probable cause did not exist and can find no other method than a Grand Jury subpoena. To say that compelling a witness to give exemplars might dissipate the suspicion is to deal in fantasies. It is more logical to say that getting exemplars elsewhere is more reasonable in that the witness would have no reason to fake an exemplar already given.

What is unreasonable here is that the government seeks to elevate to facts, its suspicion of who authored writings by the issuance of a Grand Jury subpoena. Suspicion is its sole criterion. The Government in its answer to witness' emergency motion in the 7th Circuit admits that the Affidavit contains matter based upon suspicion concerning the witness' actions. This is the very thing that the Fourth Amendment prohibits as to unreasonable searches and seizures.

The government relies on an Affidavit submitted in camera to the Court below to justify its taking exemplars. It says because of the Affidavit, the taking of exemplars is reasonable and such tactic does not violate the Fourth Amendment. A general subpoena for the production of books and records may constitute an unreasonable search and seizure and is equally indefensible as a search warrant would be if couched in similar terms.

It must again be noted that this witness has not been indicted, but is solely a witness responding to a Grand Jury subpoena. If the government means that the Affidavit is sufficient for probable cause, then a warrant should issue or the Grand Jury would have indicted if it was sure that the information in the Affidavit was sufficient to indict. Neither occurred so that probable cause was not shown and as such the Affidavit is not sufficient under the Fourth Amendment. But the Government states that probable cause is not pertinent here and attempts to hide behind the veil of a Grand Jury Subpoena. Nowhere has the Government indicated why the seizure it attempts to make is reasonable. It states it relies on an affidavit yet states that probable cause is not the issue. It separates probable cause from unreasonableness and then relies on an affidavit which would in ordinary circumstances be part of probable cause. It says there is no probable cause therefore the affidavit makes the search and seizure reasonable. In the context as presented the Grand Jury may not use its subpoena powers to effect a seizure which is otherwise violative of the Fourth Amendment. Since the Government has admitted its suspicions of the witness and does not know who authored the writings, it ought not be able to compel production of evidence without showing more than it has.

Furthermore, if the Government states that the Affidavit contains probable cause, this would violate the witness' due process right under the Fifth Amendment. This Affidavit has never been seen by the witness nor his counsel. No opportunity has been afforded him the right to contest the validity and legality of the affidavit.

U. S. v. *Suarz,* 380 F. 2nd 713; *U. S.* v. *Gillette,* 383 F. 2nd 843; *U.S.* v. *Roth,* 391 F. 2nd 507; *Rugendorf* v. *United States,* 376 U.S. 528; *Aguilar* v. *Texas,* 378 U.S. 108 and *Spinelli* v. *U. S.,* 393 U.S. 410. Rule 41 of the Federal Rules of Criminal Procedure detail the requisites for the issuing of a search warrant. Rule 41 (c) states that an aggrieved person may move against the warrant, if among other things "(4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or . . ." See *Henry* v. *Unitel States,* 361 U.S. 98.

Here this witness operates in a vacuum. The Government by submitting an affidavit in camera says the giving of exemplars is reasonable by that very fact. Yet, the witness cannot attack the validity of the Affidavit as it is impounded. This violates the very concept of due process; i.e. that is to incarcerate a man based on something he cannot see or question. It also violates his right under the Fourth Amendment and the cases and rules above cited. Thus, the Government says the Affidavit makes the giving of exemplars reasonable and yet seems to make an argument for probable cause based on an affidavit the witness has a right to attack. The Government wants it both ways. If there is no probable cause then the search and seizure must be reasonable because it is based on an affidavit which the witness has never seen. This is so patent a device to seek information from a witness in violation of his Fourth and Fifth Amendment rights that it should not be countenanced by this Court. It is the duty of courts to be watchful of the constitutional rights of the citizen and against devious and stealthy encroachment on those rights.

Furthermore, it is not reasonable nor adequate to sustain the position taken by the Government. (See *U. S.* v. *Praigg*, 336 F. Supp. 480; *In the matter of Grand Jury; Ricciarde, witness*, 337 F. Supp. 253; *U. S.* v. *Bailey*, 327 F. Supp. 802; *U. S.* v. *Harris*, 453 F. 2nd 317.)

No issue was raised in *United States* v. *Doe*, 452 F. 2nd 895 as to the content of the exemplars sought; that Court sought to distinguish between compulsion by a Grand Jury subpoena and detention by law enforcement officers, and said that while the content of the communication is entitled to the Fourth Amendment protection, the underlying identification character are open for all to see, but that in any event, the Grand Jury will act an a protective buffer between the accused and the prosecutor. It arrived at the conclusion that a handwriting exemplar has already been exposed to the public at large. The opinion is in exercise of solipcism. Factually, the case is different and it does not sustain the Government's position in the instant law suit.

III.

THE GRAND JURY.

To sustain its position in this matter, the government relies on the secrecy of Grand Jury proceedings. The Grand Jury system stems from the Fifth Amendment which does not define it. It is supposed to possess an independence which is unique, "Its authority is derived from none of the three basic divisions of our government, but rather from the People themselves." *In re April 1956 Term Grand Jury*, 239 F. 2nd 263. No one quarrels with the cases cited by the government. But those cases show that while a person may be under a duty to appear be-

fore a grand jury, his rights under the Constitution may not be abrogated. An overly broad subpoena violates the Fourth Amendment, *Hales* v. *Henkel,* 201 U.S. 43. Private books and papers are not subject to subpoena in violation of the Fourteenth and Fifth Amendments. *Boyd* v. *United States,* 116 U.S. 616.

Calling a person before a grand jury is as much a seizure as is police detention. He is as detained before a grand jury as if held by the police. If a person does not respond to a grand jury subpoena, you would see police detention in its rankest form.

Here, the witness questions the abuse of the Grand Jury process by the government in the light of the facts of this case. The disclosure sought was not of the Grand Jury's investigation, but solely that of the government. More importantly and crucially, the United States Attorney is directing the witness what to do. The exemplars sought were directed to the FBI, not the Grand Jury. The Grand Jury system is increasingly coming under attack today where it is accused of being, and justifiably so, a rubber stamp for government action. The government would make the grand jury a temple where no transgressions are ever committed on its holy ground. Being holy, no one may question its wisdom within its walls.

On July 27, 1972, Judge William J. Campbell, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, made a Report to the Members of the Conference of Metropolitan Chief District Judges of the Federal Judicial Center. Judge Campbell has tried more cases than any other Judge in

the Federal System. He was a judge for some 32 years. In his statement to the Conference with reference to eliminating the Grand Jury, he said:

> Much of the bad procedural law which clutters the administration of criminal justice today is due to deserved Supreme Court displeasure over the anachronism of the Grand Jury and its offspring—the criminal indictment. This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor —too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.
>
> I favor abolishing the grand jury and making each prosecutor responsible by statute for the prosecutions in his district, including civil responsibility for bad faith or malicious prosecution. A preliminary hearing before a magistrate to determine probable cause with the accused participating through counsel would be a great improvement over the present archaic indictment. Many of the states and indeed our own military now successfully use such a system.

IV.

THE PRELIMINARY HEARING MUST BE OPEN AND ADVERSARY.

Issue is made of the Court's ruling below that a preliminary showing of reasonableness should be required by the Government before the obtaining of an exemplar, and hides behind the sanctity of a Grand Jury. Issue has already been made as to that body to function as an independent process standing between the accused and the accuser. This case is ample evidence that it

does not. To follow the Government's argument to its logical conclusion, because it is a Grand Jury process, a witness must forego any and all rights which he may have when he appears before a Grand Jury. There is no doubt that the Government would want to accomplish this, but the Fourth and Fifth Amendments must be complied with. Further, the Government would go one step further and would want the hearing to be an ex parte in camera proceeding. That type of proceeding does not square with the requirements of the Fourth Amendment, in that that Amendment does not allow for half way measures. There should be no reason why a witness may not contest the preliminary hearing as he would in other cases under the Fourth Amendment. The Fourth Amendment does not call for any secretive proceedings, the result of which would incarcerate an individual without compliance to the probable cause, reasonableness and the looking at the Affidavits issued thereunder. There should be no reason why the Government should be allowed to use this type of procedure where it cannot do so in a proceeding involving search or arrest warrants.

The method sought is ingenious but then government has always been ingenious in circumventing and limiting the rights of people. *Hill* v. *Philpot,* 445 F. 2nd 144, *United States* v. *Bailey,* 327 F. Supp. 802, *In Re Dionisio,* 442 F. 2nd 276, and this case are examples of the extremes the government will go to obtain a result. Only in the instant case have they gone so far as to put a man in jail on the basis of an FBI affidavit, he has never seen, and which has consistently been refused him.

CONCLUSION.

For the reasons stated, the judgment of the Court of Appeals in this case, reversing the contempt orders of the District Court, should be sustained.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* MARA, AKA MARASOVICH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71–850. Argued November 6, 1972—Decided January 22, 1973

Respondent, subpoenaed to furnish handwriting exemplars to enable a grand jury to determine whether he was the author of certain writings, was held in contempt after refusing compliance, the District Court having rejected respondent's contention that such compelled production would constitute an unreasonable search and seizure. The Court of Appeals reversed, holding that the Fourth Amendment applied and that the Government had to make a preliminary showing of reasonableness. *Held:* The specific and narrowly drawn directive to furnish a handwriting specimen, which, like the compelled speech disclosure upheld in *United States* v. *Dionisio, ante*, p. —, involved production of physical characteristics, violated no legitimate Fourth Amendment interest. Pp. 2–4.

454 F. 2d 580, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part. DOUGLAS and MARSHALL, JJ., filed dissenting opinions.

SUPREME COURT OF THE UNITED STATES

No. 71-850

United States, Petitioner, v. Richard J. Mara aka Richard J. Marasovich.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 22, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Richard J. Mara, was subpoenaed to appear before the September 1971 Grand Jury in the Northern District of Illinois that was investigating thefts of interstate shipments. On two separate occasions he was directed to produce handwriting and printing exemplars to the grand jury's designated agent. Each time he was advised that he was a potential defendant in the matter under investigation. On both occasions he refused to produce the exemplars.

The Government then petitioned the United States District Court to compel Mara to furnish the handwriting and printing exemplars to the grand jury. The petition indicated that the exemplars were "essential and necessary" to the grand jury investigation and would be used solely as a standard of comparison to determine whether Mara was the author of certain writings. The petition was accompanied by an affidavit of an FBI agent, submitted *in camera*, which set forth the basis for seeking the exemplars. The District Judge rejected the respondent's contention that the compelled production of such exemplars would constitute an unreasonable

search and seizure, and he ordered the respondent to provide them. When the witness continued to refuse to do so, he was adjudged to be in civil contempt and was committed to custody until he obeyed the court order or until the expiration of the grand jury term.

The Court of Appeals for the Seventh Circuit reversed. 454 F. 2d 580. Relying on its earlier decision in *In re Dionisio*, 442 F. 2d 276, rev'd, *ante*, p. —, the Court found that the directive to furnish the exemplars would constitute an unreasonable search and seizure. "[I]t is plain that compelling [Mara] to furnish exemplars of his handwriting and printing is forbidden by the Fourth Amendment unless the Government has complied with its reasonableness requirement. . . ." 454 F. 2d, at 582.

The court then turned to two issues necessarily generated by its decision in *Dionisio*—the procedure the Government must follow and the substantive showing its must make to establish the reasonableness of the grand jury's directive. It rejected the *in camera* procedure of the District Court, and held that the Government would have to present its affidavit in open court in order that Mara might contest its sufficiency. The Court ruled that to establish "reasonableness" the Government would have to make a substantive showing: "that the grand jury investigation was properly authorized, for a purpose Congress can order, that the information sought is relevant to the inquiry, and that . . . the grand jury process is not being abused. . . . [T]he Government's affidavit must also show why satisfactory handwriting and printing exemplars cannot be obtained from other sources without grand jury compulsion." 454 F. 2d, at 584–585.

We granted certiorari, 406 U. S. 956, to consider this case with *United States* v. *Dionisio*, No. 71–229, *ante*, p. —.

We have held today in *Dionisio*, that a grand jury subpeona is not a "seizure" within the meaning of the Fourth Amendment, and further, that that Amendment is not violated by a grand jury directive compelling production of "physical characteristics" which are "constantly exposed to the public." *Ante*, p. —. Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice. See *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895, 898–899; *Bradford* v. *United States*, 413 F. 2d 467, 471–472; cf. *Gilbert* v. *California*, 388 U. S. 263, 266–267. Consequently the Government was under no obligation here, any more than in *Dionisio*, to make a preliminary showing of "reasonableness."

Indeed, this case lacks even the aspects of an expansive investigation that the Court of Appeals found significant in *Dionisio*. In that case 20 witnesses were summoned to give exemplars; here there was only one. The specific and narrowly drawn directive requiring the witness to furnish a specimen of his handwriting* violated no legitimate Fourth Amendment interest. The District Court

*The respondent contends that because he has seen neither the affidavit nor the writings in the grand jury's possession, the Government may actually be seeking "testimonial" communications—the content as opposed to the physical characteristics of his writing. But the Government's petition for the order to compel production stated: "Such exemplars will be used solely as a standard of comparison in order to determine whether the witness is the author of certain writings." If the Government should seek more than the physical characteristics of the witness' handwriting—if, for example, it should seek to obtain written answers to incriminating questions or a signature on an incriminating statement—then, of course, the witness could assert his Fifth Amendment privilege against compulsory self-incrimination.

was correct, therefore, in ordering the respondent to comply with the grand jury's request.

Accordingly, the judgment of the Court of Appeals is reversed, and this case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* DIONISIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71-229. Argued November 6, 1972—Decided January 22, 1972

A grand jury subpoenaed about 20 persons, including respondent, to give voice exemplars for identification purposes. Respondent, on Fourth and Fifth Amendment grounds, refused to comply. The District Court rejected both claims and adjudged respondent in contempt. The Court of Appeals agreed in rejecting respondent's Fifth Amendment claim but reversed on the ground that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar and that here the proposed "seizures" would be unreasonable because of the large number of witnesses subpoenaed to produce the exemplars. *Held:*

1. The compelled production of the voice exemplars would not violate the Fifth Amendment privilege against compulsory self-incrimination, since they were to be used only for identification purposes, and not for the testimonial or communicative content of the utterances. Pp. 4–6.

2. Respondent's Fourth Amendment claim is also invalid. Pp. 6–16.

(a) A subpoena to compel a person to appear before a grand jury does not constitute a "seizure" within the meaning of the Fourth Amendment, and the fact that many others besides respondent were ordered to give voice recordings did not render the subpoena unconstitutional. *Davis* v. *Mississippi*, 394 U. S. 721, distinguished. Pp. 6–12.

(b) The grand jury's directive to make the voice recording infringed no valid Fourth Amendment interest. Pp. 12–14.

(c) Since neither the summons to appear before the grand jury, nor its directive to give a voice exemplar contravened the Fourth Amendment, the Court of Appeals erred in requiring a

See concurrence and dissents re 71-850.

Syllabus

preliminary showing of reasonableness before respondent could be compelled to furnish the exemplar. P. 14.

442 F. 2d 276, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part. DOUGLAS and MARSHALL, JJ., filed dissenting opinions.

SUPREME COURT OF THE UNITED STATES

No. 71-229

United States, Petitioner, *v.* Antonio Dionisio. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 22, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

A special grand jury was convened in the Northern District of Illinois in February 1971, to investigate possible violations of federal criminal statutes relating to gambling. In the course of its investigation the grand jury received in evidence certain voice recordings that had been obtained pursuant to court orders.[1]

The grand jury subpoenaed approximately 20 persons, including the respondent Dionisio, seeking to obtain from them voice exemplars for comparison with the re-

[1] The court orders were issued pursuant to 18 U. S. C. § 2518, a statute authorizing the interception of wire communications upon a judicial determination that "(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [including the transmission of wagering information]; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

corded conversations that had been received in evidence. Each witness was advised that he was a potential defendant in a criminal prosecution. Each was asked to examine a transcript of an intercepted conversation, and to go to a nearby office of the United States Attorney to read the transcript into a recording device. The witnesses were advised that they would be allowed to have their attorneys present when they read the transcripts. Dionisio and other witnesses refused to furnish the voice exemplars, asserting that these disclosures would violate their rights under the Fourth and Fifth Amendments.

The Government then filed separate petitions in the United States District Court to compel Dionisio and the other witnesses to furnish the voice exemplars to the grand jury. The petitions stated that the exemplars were "essential and necessary" to the grand jury investigation, and that they would "be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted . . . ."

Following a hearing, the district judge rejected the witnesses' constitutional arguments and ordered them to comply with the grand jury's request. He reasoned that voice exemplars, like handwriting exemplars or fingerprints, were not testimonial or communicative evidence, and that consequently the order to produce them would not compel any witness to testify against himself. The district judge also found that there would be no Fourth Amendment violation, because the grand jury subpoena did not itself violate the Fourth Amendment, and the order to produce the voice exemplars would involve no unreasonable search and seizure within the proscription of that Amendment:

> "The witnesses are lawfully before the grand jury pursuant to subpoena. The Fourth Amendment prohibition against unreasonable search and seizure applies only where identifying physical character-

istics, such as fingerprints, are obtained as a result of unlawful detention of a suspect, or when an intrusion into the body, such as a blood test, is undertaken without a warrant, absent an emergency situation. *E. g., Davis* v. *Mississippi*, 394 U. S. 721, 724–728 (1969); *Schmerber* v. *California*, 384 U. S. 757, 770–771 (1966)." [2]

When Dionisio persisted in his refusal to respond to the grand jury's directive, the District Court adjudged him in civil contempt and ordered him committed to custody until he obeyed the court order, or until the expiration of 18 months.[3]

The Court of Appeals for the Seventh Circuit reversed. 442 F. 2d 276. It agreed with the District Court in rejecting the Fifth Amendment claims,[4] but concluded that to compel the voice recordings would violate the Fourth Amendment. In the Court's view, the grand jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." *Id.*, at 280. The Court found that the Fourth Amendment applied to grand jury process, and that "under the fourth amendment law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure. *Davis* v. *Mississippi*, 394 U. S. 721 . . . ." *Ibid.*

In *Davis* this Court held that it was error to admit the petitioner's fingerprints into evidence at his trial for

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[2] The decision of the District Court is unreported.

[3] The life of the special grand jury was 18 months, but could be extended for an additional 18 months. 18 U. S. C. § 3331.

[4] The Court also rejected the argument that the grand jury procedure violated the witnesses' Sixth Amendment right to counsel. It found the contention particularly without merit in view of the option afforded the witnesses to have their attorneys present while they made the voice recordings. 442 F. 2d 276, 278.

rape, because they had been obtained during a police detention following a lawless wholesale roundup of the petitioner and more than 20 other youths. Equating the procedures followed by the grand jury in the present case to the fingerprint detentions in *Davis*, the Court of Appeals reasoned that "[t]he dragnet effect here, where approximately 20 persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in *Davis*." *Id.*, at 281.

In view of a clear conflict between this decision and one in the Court of Appeals for the Second Circuit,[5] we granted the Government's petition for certiorari. 406 U. S. 956.

I

The Court of Appeals correctly rejected the contention that the compelled production of the voice exemplars would violate the Fifth Amendment. It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against compulsory self-incrimination. In *Holt* v. *United States*, 218 U. S. 245, 252, Mr. Justice Holmes, writing for the Court, dismissed as an "extravagant extension of the Fifth Amendment" the argument that it violated the privilege to require a defendant to put on a blouse for identification purposes. He explained that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.*, at 252–253.

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[5] *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895 (affirming civil contempt judgment against grand jury witness for refusal to furnish handwriting exemplars).

More recently, in *Schmerber* v. *California*, 384 U. S. 757, we relied on *Holt*, and noted that

> "both federal and state courts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.*, at 764 (footnote omitted).

The Court held that the extraction and chemical analysis of a blood sample involved no "shadow of testimonial compulsion upon or enforced communication by the accused." *Id.*, at 765.

These cases led us to conclude in *Gilbert* v. *California*, 388 U. S. 263, that handwriting exemplars were not protected by the privilege against compulsory self-incrimination. While "[o]ne's voice and handwriting are, of course, means of communication," we held that a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection." *Id.*, at 267. And similarly in *United States* v. *Wade*, 388 U. S. 218, we found no error in compelling a defendant accused of bank robbery to utter in a line-up words that had allegedly been spoken by the robber. The accused there was "required to use his voice as an identifying physical characteristic, not to speak his guilt." *Id.*, at 222–223.

Wade and *Gilbert* definitively refute any contention that the compelled production of the voice exemplars in this case would violate the Fifth Amendment. The

voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said.[6]

II

The Court of Appeals held that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar, and that in this case the proposed "seizures" of the voice exemplars would be unreasonable because of the large number of witnesses summoned by the grand jury and directed to produce such exemplars. We disagree.

The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and

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[6] The Court of Appeals for the Seventh Circuit appears to have recanted somewhat from its clear and correct holding in the present case that the compelled production of voice exemplars would not violate the privilege against compulsory self-incrimination. In subsequently explaining that holding, the Court qualified it:

"Nevertheless, the witnesses were potential defendants, and since the purpose of the voice exemplars was to identify the voices obtained by FBI agents pursuant to a court-ordered wiretap, the self-incriminatory impact of the compelled exemplars was clear. Thus the compelled exemplars were at odds with the spirit of the Fifth Amendment. Because the Fifth Amendment illuminates the Fourth (see . . . Boyd v. United States [116 U. S. 616] . . .). the Fourth Amendment violation appears more readily than where immunity is granted, and in *Dionisio* immunity had not yet been granted." *Fraser* v. *United States*, 452 F. 2d 616, 619 n. 5.

But *Boyd* dealt with the compulsory production of private books and records, testimonial sources, a circumstance in which the "Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630. In the present case, by contrast, no Fifth Amendment interests are jeopardized, there is no hint of testimonial compulsion. The Court of Appeals' subsequent attempt to read the "spirit of the Fifth Amendment" into the production of voice exemplars cannot survive comparison with *Wade*, *Gilbert*, and *Schmerber*.

effects, against unreasonable searches and seizures . . . ." Any Fourth Amendment violation in the present setting must rest on a lawless governmental intrusion upon the privacy of "persons" rather than on interference with "property relationships or private papers." *Schmerber* v. *California*, 384 U. S. 757, 767; see *United States* v. *Doe* (Schwartz), 457 F. 2d 895, 897. In *Terry* v. *Ohio*, 392 U. S. 1, the Court explained the protection afforded to "persons" in terms of the statement in *Katz* v. *United States*, 389 U. S. 347, that "the Fourth Amendment protects people, not places," *id.*, at 351, and concluded that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." *Terry* v. *Ohio*, 392 U. S., at 9.

As the Court made clear in *Schmerber*, *supra*, the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the "seizure" of the "person" necessary to bring him into contact with government agents, see *Davis* v. *Mississippi*, 394 U. S. 721, and the subsequent search for and seizure of the evidence. In *Schmerber* we found the initial seizure of the accused justified as a lawful arrest, and the subsequent seizure of the blood sample from his body reasonable in light of the exigent circumstances. And in *Terry*, we concluded that neither the initial seizure of the person, an investigatory "stop" by a policeman, nor the subsequent search, a pat down of his outer clothing for weapons, constituted a violation of the Fourth and Fourteenth Amendments. The constitutionality of the compulsory production of exemplars from a grand jury witness necessarily turns on the same dual inquiry—whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable "seizure" within the meaning of the Fourth Amendment.

It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. Last Term we again acknowledged what has long been recognized,[7] that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . . ." *Branzburg* v. *Hayes*, 408 U. S. 665, 682. We concluded that:

> "[a]lthough the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, *United States* v. *Bryan*, 339 U. S., at 331; *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings." *Id.*, at 688.

These are recent reaffirmations of the historically grounded obligation of every person to appear and give his evidence before the grand jury. "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair* v. *United States*, 250 U. S. 273, 281. See also *Garland* v. *Torre*, 259 F. 2d 545, 549. And while the duty may be "onerous" at times, it is "necessary to the administration of justice." *Blair* v. *United States*, *supra*, at 281.[8]

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[7] See generally *Kastigar* v. *United States*, 406 U. S. 441, 443–444; *Blair* v. *United States*, 250 U. S. 273, 279–281; 8 J. Wigmore, Evidence § 2191 (J. McNaughton rev. 1961).

[8] The obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry. See *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895, 898; *United States* v. *Winter*, 348 F. 2d 204, 207–208.

The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" in more than civic obligation. For, as Judge Friendly wrote for the Court of Appeals for the Second Circuit:

> "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." *United States* v. *Doe (Schwartz)* 457 F. 2d 895, 898.

Thus the Court of Appeals for the Seventh Circuit correctly recognized in a case subsequent to the one now before us, that a "grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied." *Fraser* v. *United States,* 452 F. 2d 616, 620; cf. *United States* v. *Weinberg,* 439 F. 2d 743, 748–749.

This case is thus quite different from *Davis* v. *Mississippi, supra,* on which the Court of Appeals primarily relied. For in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments—not the taking of the fingerprints. We noted that "[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention," 394 U. S., at 726, and we left open the question whether, consistently with the Fourth and Fourteenth Amendments, narrowly circumscribed procedures might be developed for obtaining fingerprints from people when

there was no probable cause to arrest them. *Id.*, at 728.[9] *Davis* is plainly inapposite to a case where the initial restraint does not itself infringe the Fourth Amendment.

This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. See *Boyd* v. *United States*, 116 U. S. 616, 633–635.[10] The Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms "to be regarded as reasonable." *Hale* v. *Henkel*, 201 U. S. 43, 76; cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 208, 217. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as

[9] Judge Weinfeld correctly characterized *Davis* as "but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person, no matter what the scope or duration. It held that in the circumstances there presented the detention for the sole purpose of fingerprinting was in violation of the Fourth Amendment ban against unreasonable search and seizure." *Thom* v. *New York Stock Exchange*, 306 F. Supp. 1002, 1007 (footnote omitted). See also *Allen* v. *Cupp*, 426 F. 2d 756, 760.

[10] While *Boyd* was concerned with a motion to produce invoices at a forfeiture trial, the Court treated it as the equivalent of a subpoena *duces tecum*, and *Hale* v. *Henkel*, 201 U. S. 43, 76, applied *Boyd* in the context of a grand jury subpoena.

the Fifth." *Branzburg* v. *Hayes*, 408 U. S. 665, 707–708. See also, *id.*, at 710 (POWELL, J., concurring).

But we are here faced with no such constitutional infirmities in the subpoena to appear before the grand jury or in the order to make the voice recordings. There is, as we have said, no valid Fifth Amendment claim. There was no order to produce private books and papers, and no sweeping subpoena *duces tecum*. And even if *Branzburg* be extended beyond its First Amendment moorings and tied to a more generalized due process concept, there is still no indication in this case of the kind of harassment that was of concern there.

The Court of Appeals found critical significance in the fact that the grand jury had summoned approximately 20 witnesses to furnish voice exemplars.[11] We think that fact is basically irrelevant to the constitutional issues here. The grand jury may have been attempting to identify a number of voices on the tapes in evidence, or it might have summoned the 20 witnesses in an effort to identify one voice. But whatever the case, "[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed . . . ." *United States* v. *Stone*, 429 F. 2d 138, 140. See also *Wood* v. *Georgia*, 370 U. S. 375, 392. As the Court recalled last Term, "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." *Branzburg* v.

[11] As noted above, *ante*, p. —, there is no valid comparison between the dententions of the 24 youths in *Davis*, and the grand jury subpoenas to the witnesses here. While the dragnet detentions by the police did constitute substantial intrusions into the Fourth and Fourteenth Amendment rights of each of the youths in *Davis*, no person has a justifiable expectation of immunity from a grand jury subpoena.

Hayes, 408 U. S., at 688.[12] The grand jury may well find it desirable to call numerous witnesses in the course of an investigation. It does not follow that each witness may resist a subpoena on the ground that too many witnesses have been called. Neither the order to Dionisio to appear, nor the order to make a voice recording was rendered unreasonable by the fact that many others were subjected to the same compulsion.

But the conclusion that Dionisio's compulsory appearance before the grand jury was not an unreasonable "seizure" is the answer to only the first part of the Fourth Amendment inquiry here. Dionisio argues that the grand jury's subsequent directive to make the voice recording was itself an infringement of his rights under the Fourth Amendment. We cannot accept that argument.

In *Katz* v. *United States*, *supra*, we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his home or office . . . ." 389 U. S. 347, 351. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect

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[12] "[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks* v. *United States*, 223 U. S. 178, 184." *Blair* v. *United States*, 250 U. S. 273, 282.

that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:

> "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection, . . . the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence, no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large." *United States* v. *Doe (Schwartz)*, 457 F. 2d 895, 898–899.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber*. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber* v. *California*, 384 U. S. 757, 769–770. Similarly, a seizure of voice exemplars does not involve the "severe, though brief, intrusion upon cherished personal security," effected by the "patdown" in *Terry*—"surely . . . an annoying, frightening, and perhaps humiliating experience." *Terry* v. *Ohio*, 392 U. S. 1, 24–25. Rather, this is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself, "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis*

v. *Mississippi*, 394 U. S. 721, 727; cf. *Thom* v. *New York Stock Exchange*, 306 F. Supp. 1002, 1009.

Since neither the summons to appear before the grand jury, nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirement of "reasonableness" imposed by the Court of Appeals.[13] See *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895, 899–900. A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge. *Branzburg* v. *Hayes*, 408 U. S. 665, 701. No grand jury witness is "entitled to set limits to the investigation that the grand jury may conduct." *Blair* v. *United States*, 250 U. S. 273, 282. And a sufficient basis for an indictment may only emerge at the end of the investigation when all the evidence has been received.

> "It is impossible to conceive that . . . the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." *Hale* v. *Henkel*, 201 U. S. 43, 65.

Since Dionisio raised no valid Fourth Amendment claim, there is no more reason to require a preliminary showing of reasonableness here than there would be in the case of any witness who, despite the lack of any constitutional or statutory privilege, declined to answer

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[13] In *Hale* v. *Henkel*, 201 U. S. 43, 77, the Court found that such a standard had not been met, but as noted above, *ante*, p. —, that was a case where the Fourth Amendment had been infringed by an overly broad subpoena to produce books and papers.

a question or comply with a grand jury request. Neither the Constitution nor our prior cases justify any such interference with grand jury proceedings.[14]

The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime "unless on a presentment or indictment of a Grand Jury." This constitutional guarantee presupposes an investigative body "acting independently of either prosecuting attorney or judge," *Stirone* v. *United States*, 361 U. S. 212, 218, whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.[15] Any holding

[14] MR. JUSTICE MARSHALL in dissent suggests that a preliminary showing of "reasonableness" is required where the grand jury subpoenas a witness to appear and produce handwriting or voice exemplars, but not when it subpoenas him to appear and testify. Such a distinction finds no support in the Constitution. The dissent argues that there is a potential Fourth Amendment violation in the case of a subpoenaed grand jury witness because of the asserted intrusiveness of the initial subpoena to appear—the possible stigma from a grand jury appearance and the inconvenience of the official restraint. But the initial directive to appear is as intrusive if the witness is called simply to testify as it is if he is summoned to produce physical evidence.

[15] "[T]he institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." *Ex parte Bain*, 121 U. S. 1, 11 (quoting grand jury charge of Justice Field). See also *Wood* v. *Georgia*, 370 U. S. 375, 390.

that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. Cf. *United States v. Ryan*, 402 U. S. 530, 532–533; *Costello* v. *United States*, 350 U. S. 359, 363–364; *Cobbledick* v. *United States*, 309 U. S. 323, 327–328.[16] The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

Since the Court of Appeals found an unreasonable search and seizure where none existed, and imposed a preliminary showing of reasonableness where none was required, its judgment is reversed and this case is remanded to that Court for further proceedings consistent with this opinion.

It is so ordered.

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[16] The possibilities for delay caused by requiring initial showings of "reasonableness" are illustrated by the Court of Appeals' subsequent decision in *In re September 1971 Grand Jury*, 454 F. 2d 580, rev'd *sub nom*, *United States* v. *Mara*, *post*, p. —, where the Court held that the Government was required to show in an adversary hearing that its request for exemplars was reasonable, and "reasonableness" included proof that the exemplars could not be obtained from other sources.

SUPREME COURT OF THE UNITED STATES

Nos. 71–229 AND 71–850

United States, Petitioner, 71–229 *v.* Antonio Dionisio. United States, Petitioner, 71–850 *v.* Richard J. Mara aka Richard J. Marasovich.	On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 22, 1973]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I agree, for the reasons stated by the Court, that petitioners' Fifth Amendment claims are without merit. I dissent, however, from the Court's rejection of petitioners' Fourth Amendment claims as also without merit. I agree that no unreasonable seizure in violation of the Fourth Amendment is effected by a grand jury subpoena limited to requiring the appearance of a suspect to *testify*. But insofar as the subpoena requires a suspect's appearance in order to obtain his voice or handwriting exemplars from him, I conclude, substantially in agreement with Part II of my Brother MARSHALL's dissent, that the reasonableness under the Fourth Amendment of such a seizure cannot simply be presumed. I would therefore affirm the judgments of the Court of Appeals reversing the contempt convictions and remand with directions to the District Court to afford the Government the opportunity to prove reasonableness under the standard fashioned by the Court of Appeals.

SUPREME COURT OF THE UNITED STATES

Nos. 71–229 AND 71–850

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[January 22, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Judge William Campbell, who has been on the District Court in Chicago for over 32 years, recently made the following indictment against the grand jury: [1]

> "This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."

It is indeed common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive. The concession by the Court that the grand jury is no longer in a realistic sense "a protective bulwark standing solidly between the ordinary citizen and over-zealous prosecutor" is reason enough to affirm these judgments.

It is not uncommon for witnesses summoned to appear

[1] 55 Fed. Rules Dec. 229, 253 (1972).

before the grand jury at a designated room to discover that the room is the room of the prosecutor. The cases before us today are prime examples of this perversion.

Respondent Dionisio and approximately 19 others were subpoenaed by the Special February 1971 Grand Jury for the Northern District of Illinois in an investigation of illegal gambling operations. During the investigation the grand jury had received as exhibits voice recordings obtained under court orders, on warrants issued under 18 U. S. C. § 2518 authorizing wiretaps. The witnesses were instructed to go to the U. S. Attorney's office, with their own counsel if they desired, and in the company of an FBI agent who had been appointed as an agent of the grand jury by its foreman, and to read the transcript of the wire interception. The readings were recorded. The grand jury then compared the voices taken from the wiretap and the witnesses' record. Dionisio refused to make the voice exemplars on the grounds they were violating his rights under the Fourth and Fifth Amendments. The Government filed in the United States District Court for the Northern District of Illinois to compel the witnesses to furnish the exemplars to the grand jury. The court rejected the constitutional arguments of the defendants and demanded compliance. Dionisio again refused and was adjudged in civil contempt and placed in prison until he obeyed the court order or until the term of the special grand jury expired. The Court of Appeals reversed, concluding that to compel compliance would violate the Fourth Amendment rights. It held that voice exemplars are protected by the Constitution from unreasonable seizures and that the Government failed to show the reasonableness of its actions.

The Special September 1971 Grand Jury, also in the Northern District of Illinois, was convened to investigate thefts of interstate shipments of goods that occurred

in the State. Respondent Mara was subpoenaed and was requested to submit before the grand jury a sample of his handwriting. Mara refused. The Government went to the District Court for the Northern District of Illinois, asserting to the court that the handwriting exemplars were "essential and necessary" to the investigation. In an "in camera" proceeding, the Court held that the witness must comply with the request of the grand jury. The Court of Appeals reversed on the basis of its decision in *In re Dionisio*. It outlined the procedures the Government must follow in cases of this kind. First, the hearing to determine the constitutionality of the seizure must be held in open court in an adversary manner. Substantially, the Government must show that the grand jury was properly authorized to investigate a matter that Congress had power to regulate, that the information sought was relevant to the inquiry, and that the grand jury's request for exemplars was adequate, but not excessive, for the purposes of the relevant inquiry.

Today, the Court in its majority overrules this reasoned opinion of the Seventh Circuit.

Under the Fourth Amendment law enforcement officers may not compel the production of evidence absent a showing of the reasonableness of the seizure. *Davis* v. *Mississippi*, 394 U. S. 721; *Boyd* v. *United States*, 116 U. S. 616. The test protects the person's expectation of privacy over the thing. We said in *Katz* v. *United States*, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection. But what he seeks to preserve as private, even though in an area accessible to the public, may be constitutionally protected." 389 U. S. 347, 351. The Government asserts that handwriting and voice exemplars do not invade the privacy of an

individual when taken because they are physical characteristics that are exposed to the public. It argues that, unless the person involved is a recluse, these characteristics are not meant to be private to the individual and thus are not subject to the aid of the Fourth Amendment.

This Court has held that fingerprints are subject to the requirements of the Search and Seizure Clause of the Fourth Amendment, *Davis* v. *Mississippi*, 394 U. S. 721. On the other hand, facial scars, birthmarks, and other facial features have been said to be "in plain view" and not protected. *United States* v. *Doe* (*Schwartz*), 457 F. 2d 895.

In *Davis* the sheriff in Mississippi rounded up 24 Blacks when a rape victim described her assailant only as a young Negro. Each was fingerprinted and then released. Davis was presented to the victim but was not identified. He was jailed without probable cause, and only later did the FBI confirm that his fingerprints matched those on the window of the victim's home. The Court held that the fingerprints could not be admitted, as they were seized without reasonable grounds. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrest" or "investigatory detentions." *Davis* v. *Mississippi*, 394 U. S. 721, 726–727. The dragnet effect in *Dionisio*, where approximately 20 people were subpoenaed for purposes of identification, was just the kind of invasion that the *Davis* case sought to prevent. Facial features can be presented to the public regardless of the cooperation or compulsion of the owner of the features. But to get the exemplars, the individual must

be involved. So, although a person's handwriting is used in everyday life and speech is the vehicle of normal, social intercourse, when these personal characteristics are sought for purposes of identification, the government enters the zone of privacy and in my view must make a showing of reasonableness before seizures may be made.

The Government contends that since the production was before the grand jury, a different standard of constitutional law exists because the grand jury has broad investigatory powers. *Blair* v. *United States*, 250 U. S. 273. Cf. *United States* v. *Bryan*, 339 U. S. 323. The Government concedes that the Fourth Amendment applies to the grand jury and prevents it from executing subpoenaes *duces tecum* that are overly broad. *Hale* v. *Henkel*, 201 U. S. 43, 76. It asserts, however, that that is the limit of its application. But the Fourth Amendment is not so limited, as this Court has held in *Davis*, *supra*, and reiterated in *Terry* v. *Ohio*, 392 U. S. 1, where it held that the Amendment comes into effect whether or not there is a fullblown search. The essential purpose is to extend its protection "wherever an individual may harbor a reasonable 'expectation of privacy.'" 392 U. S. 1, 9.

Just as the nature of the Amendment rebels against the limits that the Government seeks to impose on its coverage, so does the nature of the grand jury itself. It was secured at Runnymede from King John as a cornerstone of the liberty of the people. It was to serve as a buffer between the State and the offender. For no matter how obnoxious a person may be, the United States cannot prosecute for a felony without an indictment. The individual is therefore protected by a body of his peers who have no axes to grind or any government agency to serve. It is the only accusatorial body of the Federal Government recognized by the Constitu-

tion. "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." [2] *Stirone* v. *United States*, 361 U. S. 212, 218. But here, as the Court of Appeals said, "It is evident that the grand jury is seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." *Dionisio* v. *United States*, 442 F. 2d 276, 280. See *Hannah* v. *Larche*, 363 U. S. 420, 497–499 (dissenting opinion). Are we to stand still and watch the prosecution evade its own constitutional restrictions on its powers by turning the grand jury into its agents?

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[2] As Mr. Justice Black said in *In re Groban*, 352 U. S. 330, 346–347:

"The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintential or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them."

Although that excerpt is from a dissent on the particular facts of the case, there could be no disagreement as to the accuracy of the description of the grand jury's historical function.

The tendency is for government to use shortcuts in its search for instruments more susceptible to its manipulation than was the historic grand jury. See *Hannah* v. *Larche*, 363 U. S. 420, 505 (dissenting opinion); *Jenkins* v. *McKeithen*, 395 U. S. 411.

Are we to allow the Government to usurp powers that were granted to the people by Magna Carta and codified in our Constitution? That will be the result of the majority opinion unless we continue to apply to the grand jury the protection of the Fourth Amendment.

As the Court stated in *Hale* v. *Henkel*, 201 U. S. 43, 59, "the most valuable function of the grand jury" was "to stand between the prosecutor and the accused, or to determine whether the charge was founded upon credible testimony or was dictated by malice or personal illwill."

The Court held in that case that the Fourth Amendment was applicable to grand jury proceedings and that a sweeping all-inclusive subpoena was "equally indefensible as a search warrant would be if couched in similar terms." *Id.*, 77.

Of course, the grand jury can require people to testify. *Hale* v. *Henkel* makes plain that proceedings before the grand jury do not carry all of the impedimenta of a trial before a petit jury. To date the grand jury cases have involved only testimonial evidence. To say, as the Government suggests, that nontestimonial evidence is free from any restraint imposed by the Fourth Amendment is to give those, who today manipulate grand juries, vast and uncontrollable power.

The executive, acting through a prosecutor, could not have obtained these exemplars as he chose, for as stated by the Court of Appeals for the Eighth Circuit, "We conclude that the taking of the handwriting exemplars . . . was a search and seizure under the Fourth Amendment." *United States* v. *Harris*, 453 F. 2d 1317, 1319. As *Katz* v. *United States*, *supra*, makes plain the searches that may be made without prior approval by judge or magistrate are "subject only to a few specifically established and well-delineated exceptions." 389 U. S., at 357.

The showing required by the Court of Appeals in the *Mara* case was that the Government's showing of need

for the exemplars be "reasonable," which "is not necessarily synonymous with probable cause." 454 F. 2d 580, 584. When we come to grand juries, probable cause in the strict Fourth Amendment meaning of the term does not have in it the same ingredients pointing toward guilt as it does in the arrest and trial of people. In terms of probable cause in the setting of the grand jury, the question is whether the exemplar sought is in some way connected with the suspected criminal activity under investigation. Certainly less than that showing would permit the Fourth Amendment to be robbed of all of its vitality.

In the *Mara* case the prosecutor submitted to the District Court an affidavit of a Government investigator stating the need for the exemplar based on its investigation. The District Court passed on the matter *in camera,* not showing the affidavit to either petitioner or his counsel. The Court of Appeals, relying on *Alderman* v. *United States,* 394 U. S. 165, 183, held that in such cases there should be an adversary proceeding. 454 F. 2d, at 582–583. If "reasonable cause" is to play any function in curbing the executive appetite to manipulate grand juries, there must be an opportunity for a showing that there was no "reasonable cause." As we stated in *Alderman:* "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." 394 U. S., at 184.

The District Court in the *Dionisio* case went part way by allowing the witness to have his counsel present when the voice exemplars were prepared in the prosecutor's office. 442 F. 2d, at 278. The Court of Appeals acted

in a traditionally fair way when it ruled that the reasonableness of a prosecutor's request for exemplars be put down for an adversary hearing before the District Court. It would be a travesty of justice to allow the prosecutor to do under the cloak of the grand jury what he could not do on his own.

In view of the disposition which I would make of these cases, I need not reach the Fifth Amendment question. But lest there be any doubt as to my position, I adhere to my dissents in *United States* v. *Wade*, 388 U. S. 218, 243, and in *Schmerber* v. *California*, 384 U. S. 757, 772–779, to the effect that the Fifth Amendment is not restricted to testimonial compulsion.

SUPREME COURT OF THE UNITED STATES

Nos. 71-229 AND 71-850

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[January 22, 1973]

MR. JUSTICE MARSHALL, dissenting.

I

The Court considers *United States* v. *Wade*, 388 U. S. 218, 221–223 (1967), and *Gilbert* v. *California*, 388 U. S. 263, 265–267 (1967), dispositive of respondent Dionisio's contention that compelled production of a voice exemplar would violate his Fifth Amendment privilege against compulsory self-incrimination. Respondent Mara also argued below that compelled production of the handwriting and printing exemplars sought from him would violate his Fifth Amendment privilege. I assume the Court would consider *Wade* and *Gilbert* to be dispositive of that claim as well.[1] The Court reads those cases as holding that voice and handwriting exemplars may be sought for the exclusive purpose of measuring "the physi-

[1] Before this Court respondent Mara has argued only that the Government may be seeking the handwriting exemplars to obtain not merely identification evidence, but incriminating "testimonial" evidence. I certainly agree with the Court that if respondent's contention proves correct, he will be entitled to assert his Fifth Amendment privilege.

cal properties" of the witness' voice or handwriting without running afoul of the Fifth Amendment privilege. *Ante*, at —. Such identification evidence is not within the purview of the Fifth Amendment, the Court says, for, at least since *Schmerber* v. *California*, 384 U. S. 757, 764 (1966), it has been clear that while "the privilege is a bar against compelling 'communications' or 'testimony,' . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

I was not a Member of this Court when *Wade* and *Gilbert* were decided. Had I been, I would have found it most difficult to join those decisions insofar as they dealt with the Fifth Amendment privilege. Since, as I discuss in Part II, I consider the Fourth Amendment to require affirmance of the decisions below in these cases, I need not rely at this time upon the Fifth Amendment privilege. Nevertheless, I feel constrained to express here at least my serious reservations concerning the Fifth Amendment portions of *Wade* and *Gilbert*, since those decisions are so central to the Court's result today.

The root of my difficulty with *Wade* and *Gilbert* is the testimonial evidence limitation that has been imposed upon the Fifth Amendment privilege in the decisions of this Court. That limitation is at odds with what I have always understood to be the function of the privilege. I would, of course, include testimonial evidence within the privilege, but I have grave difficulty drawing a line there. For I cannot accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect. Indeed, until *Wade* and *Gilbert*, the Court had never carried the testimonial limitation so far as to allow law enforcement officials to enlist an in-

dividual's overt assistance—that is, to enlist his will—in incriminating himself. And I remain unable to discern any substantial constitutional footing on which to rest that limitation on the reach of the privilege.

Certainly it is difficult to draw very much support for the testimonial limitation from the language of the Amendment itself. The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Nowhere is the privilege explicitly restricted to testimonial evidence. To read such a limitation into the privilege through its reference to "witness" is just the sort of crabbed construction of the provision that this Court long eschewed. Thus, some 80 years ago the Court rejected the contention that a grand jury witness could not invoke the privilege because it applied, in terms, only in a "criminal case." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). The Court emphasized that the privilege "is as broad as the mischief against which it seeks to guard." *Ibid.* Even earlier, the Court, in holding that the privilege could be invoked in the context of a civil forfeiture proceeding, had warned that

> "constitutional provisions for the security of the person and property should be construed liberally. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

Moreover, *Boyd* itself, which involved a subpoena directed at private papers, makes clear that "witness" is not to be restricted to the act of giving oral testimony against oneself. Rather, that decision suggests what I believe to be the most reasonable construction of the protection afforded by the privilege—namely, protection

against being "compell[ed] . . . to furnish evidence against" oneself, *id.*, at 637. See also *Schmerber* v. *California*, 384 U. S., at 776–777 (Black, J., dissenting).

Such a construction is dictated by the purpose of the privilege. In part, of course, the privilege derives from the view that certain forms of compelled evidence are inherently unreliable. See, *e. g.*, *In re Gault*, 387 U. S. 1, 47 (1967). But the privilege—as a constitutional guarantee subject to invocation by the individual—is obviously far more than a rule concerned simply with the probative force of certain evidence. Its roots "tap the basic stream of religious and political principle [and reflect] the limits of the individual's attornment to the state . . . ." *Ibid.* Its "constitutional foundation . . . is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . , to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U. S. 436, 460 (1966). Cf. also *Rogers* v. *Richmond*, 365 U. S. 534, 540–541 (1961). It is only by prohibiting the Government from compelling an individual to cooperate affirmatively in securing incriminating evidence which could not be obtained without his active assistance, that "the inviolability of the human personality" is assured. In my view, the testimonial limitation on the privilege simply fails to take account of this purpose.

The root of the testimonial limitation seems to be Mr. Justice Holmes' opinion for the Court in *Holt* v. *United States*, 218 U. S. 245 (1910). In *Holt*, the defendant challenged the admission at trial of certain testimony that a blouse belonged to the defendant. A witness

testified that defendant put on the blouse and that it fitted him. The defendant argued that this testimony violated his Fifth Amendment privilege because he had acted under duress. In the course of disposing of the defendant's argument, Justice Holmes said that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.*, at 252–253. This remark can only be considered *dictum*, however, for the case arose before this Court established the rule that illegally seized evidence may not be admitted in federal court, see *Weeks* v. *United States*, 232 U. S. 383 (1914), and thus, Holt's claim of privilege was ultimately disposed of simply on the ground that "when [a man] is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. *Adams* v. *New York*, 192 U. S. 585." 218 U. S., at 253.

With its decision in *Schmerber*, however, the Court elevated the *dictum* of *Holt* to full constitutional stature. Justice Holmes' language was central to the Court's conclusion that the taking of a blood sample, over the objection of the individual, to determine alcoholic content was not barred by the Fifth Amendment privilege since the resulting blood test evidence "was neither [the individual's] testimony nor evidence relating to some communicative act . . . ." 384 U. S., at 765. Indeed, the Court appeared to consider it established since *Holt* that the Fifth Amendment privilege extended only to " 'testimony' " or " 'communications,' " but not to " 'real or physical evidence,' " *id.*, at 764; and this "established" principle was sufficient, for the Court, to dispose of any "loose dicta" in *Miranda* which might suggest a more extensive purpose for the privilege.

After *Schmerber*, *Wade* and *Gilbert* were relatively easy steps for a Court focusing exclusively on the nature of the evidence compelled. Thus, the Court indicated that "compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber," was "no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse." 388 U. S., at 222. Similarly, in *Gilbert*, 388 U. S., at 266–267, the Court reasoned that "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying characteristic outside [the privilege's] protection."

Yet if we look beyond the testimonial limitation, *Wade* and *Gilbert* clearly were not direct and easy extensions of *Schmerber* and *Holt*. For it is only in *Wade* and *Gilbert* that the Court, for the first time, held in effect that an individual could be compelled to give to the State evidence against himself which could be secured only through his affirmative cooperation—that is, "to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime," *Wade* v. *United States*, 388 U. S., at 261 (Fortas, J., dissenting). The voice and handwriting samples sought in *Wade* and *Gilbert* simply could not be obtained without the individual's active cooperation. *Holt* and *Schmerber* were certainly not such cases. In those instances the individual was required at most to submit passively to a blood test or to the fitting of a shirt. Whatever the reasoning of those decisions, I do not understand them to involve the sort of interference with an individual's personality and will that the Fifth Amendment privilege was intended to prevent. To be sure, in situations such as those presented in *Holt* and *Schmerber* the individual may resist and be physically subdued, and in that sense, compulsion may be employed. Or, alternatively, the individual in those situations may elect to yield to the

threat of contempt and cooperate affirmatively with his accusers eliminating the need for force, and in that sense, his will may be subverted. But in neither case is the intrusion an individual's dignity the same or as severe as the affront which occurs when the state secures from him incriminating evidence which can be obtained *only* by enlisting the cooperation of his will. Thus, I do not necessarily consider the results in *Holt* and *Schmerber* to be inconsistent with the purpose and proper reach of the Fifth Amendment privilege.[2]

But so long as we have a Constitution which protects at all costs the integrity of individual volition against subordinating state power, *Wade* and *Gilbert* must be viewed as legal anomalies. As Mr. Justice Fortas, joined by MR. JUSTICE DOUGLAS and the Chief Justice, argued on the day those cases were decided:

> "Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that. According to the Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the Commission of the crime. Presumably this would include, 'Your money or your life'—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system." *United States* v. *Wade*, 388 U. S., at 260. See also *Gilbert* v. *California*, 388 U. S., at 291–292 (Fortas, J., dissenting).

I fear the Court's decisions today are further illustrations of the extent to which the Court has gone astray

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[2] This is not to say that, apart from the Fifth Amendment privilege, there might not be, serious due process problems with physical compulsion applied to an individual's person to secure identifying evidence against his will. Cf. *Rochin* v. *California*, 342 U. S. 165 (1952). But cf. *Breithaupt* v. *Abram*, 352 U. S. 432 (1957).

in defining the reach of the Fifth Amendment privilege and has lost touch with the Constitution's concern for the "inviolability of the human personality." In both these cases, the Government seeks to secure possibly incriminating evidence which can be acquired only with respondents' affirmative cooperation. Thus, even if I did not consider the Fourth Amendment to require affirmance of the decisions of the Court of Appeals, I would nevertheless find it extremely difficult to accept a reversal of those decisions in the face of what seems to me the proper construction of the Fifth Amendment privilege.

II

The Court concludes that the exemplars sought from the respondents are not protected by the Fourth Amendment because respondents have surrendered their expectation of privacy with respect to voice and handwriting by knowingly exposing these to the public, see *Katz* v. *United States*, 389 U. S. 347, 351 (1967). But even accepting this conclusion, it does not follow that the investigatory seizures of respondents, accomplished through the use of subpoenas ordering them to appear before the grand jury—and thereby necessarily interfering with their personal liberty—are outside the protection of the Fourth Amendment. To the majority, though, "[i]t is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." *Ante*, at —. With due respect, I find nothing "clear" about so sweeping an assertion.

There can be no question that investigatory seizures effected by the police are subject to the constraints of the Fourth and Fourteenth Amendments. In *Davis* v. *Mississippi*, 394 U. S. 721, 727 (1969), the Court observed that only the Term before, in *Terry* v. *Ohio*, 392 U. S. 1, 19 (1968), it had rejected "'the notions that the

Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search." ' " As a result, the Court held in *Davis* that investigatory seizures for the purpose of obtaining fingerprints are subject to the Fourth Amendment even though fingerprints themselves are not protected by that Amendment.[3] The Court now seems to distinguish *Davis* from the present cases, in part, on the ground that in *Davis* the authorities engaged in a lawless dragnet of a large number of Negro youths. Certainly, the peculiarly offensive exercise of investigatory powers in *Davis* heightened the Court's sensitivity to the dangers inherent in Mississippi's argument that the Fourth Amendment was not applicable to investigatory seizures. But the presence of a dragnet was not the constitutional determinant there; rather, it was police interference with the petitioner's own liberty that brought the Fourth and Fourteenth Amendments into play, as should be evident from the Court's substantial reliance on *Terry* which involved no dragnet.

Like *Davis*, the present cases involve official investigatory seizures which interfere with personal liberty. The Court considers dispositive, however, the fact that the seizures were effected by the grand jury, rather than the police. I cannot agree.

First, in *Hale* v. *Henkel*, 201 U. S. 43, 76 (1906), the Court held that a subpoena *duces tecum* ordering "the production of books and papers [before a grand jury] may constitute an unreasonable search and seizure within the Fourth Amendment," and on the particular facts of the case, it concluded that the subpoena was "far too

[3] We left open the further question whether such an investigatory seizure might, under certain circumstances, be made on information insufficient to establish probable cause to arrest. See 394 U. S., at 727–728.

sweeping in its terms to be regarded as reasonable." Considered alone, *Hale* would certainly seem to carry a strong implication that a subpoena compelling an individual's personal appearance before a grand jury, like a subpoena ordering the production of private papers, is subject to the Fourth Amendment standard of reasonableness. The protection of the Fourth Amendment is not, after all, limited to personal "papers," but extends also to "persons," "houses," and "effects." It would seem a strange hierarchy of constitutional values that would afford papers more protection from arbitrary governmental intrusion than people.

The Court, however, offers two interrelated justifications for excepting grand jury subpoenas directed at "persons," rather than "papers," from the constraints of the Fourth Amendment. These are an "historically grounded obligation of every person to appear and give his evidence before the grand jury," *ante*, at —, and the relative unintrusiveness of the grand jury subpoena on an individual's liberty.

In my view, the Court makes more of history than is justified. The Court treats the "historically grounded obligation" which it now discerns as extending to all "evidence," whatever its character. Yet, so far as I am aware, the obligation "to appear and give evidence" has heretofore been applied by this Court only in the context of testimonial evidence, either oral or documentary. Certainly the decisions relied upon by the Court, despite some dicta, have not recognized an obligation of a broader sweep.

Blair v. *United States*, 250 U. S. 273, 281 (1919), indicated only that "the giving of *testimony* and the attendance upon court or grand jury in order to *testify* are public duties which every person . . . is bound to perform upon being properly summoned . . . ." (Emphasis added.) Similarly, just last Term, the Court reaffirmed

only that "[t]he power of government to compel persons to *testify* in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence," nothing more. *Kastigar* v. *United States*, 406 U. S. 441, 443 (1972) (emphasis added). And, Chief Justice Hughes described "one of the duties which the citizen owes to his government" to be that of "attending its courts and giving his *testimony* whenever his is properly summoned . . . ." *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932). In short, history, at least insofar as heretofore reflected in this Court's cases, does not necessarily establish an obligation to appear before a grand jury for other than testimonial purposes. See *Branzburg* v. *Hayes*, 408 U. S. 665 (1972); *Ullmann* v. *United States*, 350 U. S. 422, 439 n. 15 (1956); *Piemonte* v. *United States*, 367 U. S. 556, 559 n. 2 (1961); *Wilson* v. *United States*, 221 U. S. 361, 372 (1911); *Hale* v. *Henkel*, 201 U. S., at 65. See also *United States* v. *Bryan*, 339 U. S. 323, 331 (1950); *Brown* v. *Walker*, 161 U. S. 591, 600 (1896); *Garland* v. *Torre*, 259 F. 2d 545, 549 (CA2), cert. denied, 358 U. S. 910 (1958).

In the present cases—as the Court itself argues in its discussion of the Fifth Amendment privilege—it was not testimony that the grand juries sought from respondents, but physical evidence. The Court glosses over this important distinction from its prior decisions, however, by artificially bifurcating its analysis of what is taking place in these cases—that is, by effectively treating what is done with individuals once they are before the grand jury as irrelevant in determining what safeguards are to govern the procedures by which they are initially compelled to appear. Nonetheless, the fact remains that the historic exception to which the Court resorts is not necessarily as broad as the context in which it is now employed. Hence, I believe that the question we must consider is whether an extension of that exception is warranted, and if so, under what conditions.

In approaching these questions, we must keep in mind that "[t]his Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty . . . .'" *Harris* v. *United States*, 331 U. S. 145, 150 (1947). As a rule, the Amendment stands as an essential bulwark against arbitrary and unreasonable governmental intrusion—whatever its form, whatever its purpose, see, *e. g.*, *Camara* v. *Municipal Court*, 387 U. S. 523 (1967)—upon the privacy and liberty of the individual, see, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968); *Jones* v. *United States*, 362 U. S. 257, 261 (1960). Given the central role of the Fourth Amendment in our scheme of constitutional liberty, we should not casually assume that governmental action which may result in interference with individual liberty is excepted from its requirements. Cf. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 455 (1971); *Katz* v. *United States*, 389 U. S. 347, 357 (1967); *Camara* v. *Municipal Court*, 387 U. S., at 528–529. The reason for any exception to the coverage of the Amendment must be fully understood and the limits of the exception should be defined accordingly. To do otherwise would create a danger of turning the exception into the rule and lead to the "impairment of the rights for the protection of which [the Amendment] was adopted," *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357 (1931); cf. *Grau* v. *United States*, 287 U. S. 124, 128 (1932).

The Court seems to reason that the exception to the Fourth Amendment for grand jury subpoenas directed at persons is justified by the relative unintrusiveness of the grand jury process on an individual's liberty. The Court, adopting Chief Judge Friendly's analysis in *United States* v. *Doe (Schwartz)*, 457 F. 2d 895, 898 (CA2 1972), suggests that arrests or even investigatory

"stops" are inimical to personal liberty because they may involve the use of force; they may be carried out in demeaning circumstances; and at least an arrest may yield the social stigma of a record. By contrast, we are told, a grand jury subpoena is a simple legal process, which is served in an unoffensive manner; it results in no stigma; and a convenient time for appearance may always be arranged. The Court would have us believe, in short, that, unlike an arrest or an investigatory "stop," a grand jury subpoena entails little more inconvenience than a visit to an old friend. Common sense and practical experience indicate otherwise.

It may be that service of a grand jury subpoena does not involve the same potential for momentary embarrassment as does an arrest or investigatory "stop."[4] But this difference seems inconsequential in comparison to the substantial stigma which—contrary to the Court's assertion—may result from a grand jury appearance as well as from an arrest or investigatory seizure. Public knowledge that a man has been summoned by a federal grand jury investigating, for instance, organized criminal activity can mean loss of friends, irreparable injury to business, and tremendous pressures on one's family life. Whatever nice legal distinctions may be drawn between police and prosecutor, on the one hand, and the grand jury, on the other, the public often treats an appearance before a grand jury as tantamount to a visit to the station house. Indeed, the former is frequently more damaging than the latter, for a grand jury appearance has an air of far greater gravity than a brief visit "downtown" for a "talk." The Fourth Amendment was placed in our Bill of Rights to protect the individual citizen from such potentially disruptive governmental intrusion into his private life unless conducted reasonably and with sufficient cause.

[4] But cf. *Davis* v. *Mississippi*, 394 U. S., at 727.

Nor do I believe that the constitutional problems inherent in such governmental interference with an individual's person are substantially alleviated because one may seek to appear at a "convenient time." In *Davis* v. *Mississippi*, 394 U. S., at 727, it was recognized that an investigatory detention effected by the police "need not come unexpectedly or at an inconvenient time." But this fact did not suggest to the Court that the Fourth Amendment was inapplicable; it was considered to affect, at most, the type of showing a State would have to make to justify constitutionally such a detention, see *ibid.* No matter how considerate a grand jury may be in arranging for an individual's appearance, the basic fact remains that his liberty has been officially restrained for some period of time. In terms of its effect on the individual, this restraint does not differ meaningfully from the restraint imposed on a suspect compelled to visit the police station house. Thus, the nature of the intrusion on personal liberty caused by a grand jury subpoena cannot, without more, be considered sufficient basis for denying respondents the protection of the Fourth Amendment.

Of course, the Fourth Amendment does not bar all official seizures of the person, but only those that are unreasonable and are without sufficient cause. With this in mind, it is possible at least to explain, if not justify, the failure to apply the protection of the Fourth Amendment to grand jury subpoenas requiring individuals to appear and *testify*. Thus, while it is true that we have traditionally given the grand jury broad investigatory powers, particularly in terms of compelling the appearance of persons before it, see, *e. g.*, *Branzburg* v. *Hayes*, 408 U. S., at 688, 701–702; *Blair* v. *United States*, 250 U. S., at 282, it must be understood that we have done so in heavy reliance on certain essential assumptions.

Certainly the most celebrated function of the grand jury is to stand between the Government and the citizen

and thus to protect the latter from harassment and unfounded prosecution. See, *e. g., Wood* v. *Georgia,* 370 U. S. 375, 390 (1962); *Hoffman* v. *United States,* 341 U. S. 479, 485 (1951); *Ex parte Bain,* 121 U. S. 1, 11 (1887). The grand jury does not shed those characteristics which give it insulating qualities when it acts in its investigative capacity. Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people. *Hale* v. *Henkel,* 201 U. S., at 61. As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep. The anticipated neutrality of the grand jury, even when acting in its investigative capacity, may perhaps be relied upon to prevent unwarranted interference with the lives of private citizens and to ensure that the grand jury's subpoena powers over the person are exercised in only a reasonable fashion. Under such circumstances, it may be justifiable to give the grand jury broad personal subpoena powers that are outside the purview of the Fourth Amendment, for—in contrast to the police—it is not likely that it will abuse those powers.[5] Cf. *Costello* v. *United States,* 350 U. S. 359, 362 (1956); *Stirone* v. *United States,* 361 U. S. 212, 218 (1960).

Whatever the present day validity of the historical assumption of neutrality which underlies the grand jury process,[6] it must at least be recognized that if a grand jury is deprived of the independence essential to the assumption of neutrality—if it effectively surrenders that independence to a prosecutor—the dangers of ex-

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[5] When the grand jury does overstep its power and acts maliciously, courts are certainly not totally without power to control it. See n. 9, *infra.*

[6] Indeed, the Court today acknowledges that "[t]he grand jury may no longer always serve its historic role as a protective bulwark." *Ante,* at —.

cessive and unreasonable official interference with personal liberty are exactly those which the Fourth Amendment was intended to prevent. So long as the grand jury carries on its investigatory activities only through the mechanism of testimonial inquiries, the danger of such official usurpation of the grand jury process may not be unreasonably great. Individuals called to testify before the grand jury will have available their Fifth Amendment privilege against self-incrimination. Thus, at least insofar as incriminating information is sought directly from a particular criminal suspect,[7] the grand jury process would not appear to offer law enforcement officials a substantial advantage over ordinary investigative techniques.

But when we move beyond the realm of a grand jury investigations limited to testimonial inquiries, as the Court does today, the danger increases that law enforcement officials may seek to usurp the grand jury process for the purpose of securing incriminating evidence from a particular suspect through the simple expedient of a subpoena. In view of the Court's Fourth Amendment analysis of the respondents' expectations of privacy concerning their handwriting and voice exemplars and in view of the testimonial evidence limitation on the reach of the Fifth Amendment privilege, there is essentially no objection to be made once a suspect is before the grand jury and exemplars are requested. Thus, if the grand jury may summon criminal suspects for such purposes without complying with the Fourth Amendment, it will obviously present an attractive investigative tool to

[7] Of course, the grand jury does provide an important mechanism for investigating possible criminal activity through witnesses who may have first-hand knowledge of the activities of others. But given the Fifth Amendment privilege, it does not follow that the grand jury is a useful mechanism for securing incriminating testimony from the suspect himself.

prosecutor and police. For what law enforcement officers could not accomplish directly themselves after our decision in *Davis* v. *Mississippi*, they may now accomplish indirectly through the grand jury process.

Thus, the Court's decisions today can serve only to encourage prosecutorial exploitation of the grand jury process, at the expense of both individual liberty and the traditional neutrality of the grand jury. Indeed, by holding that the grand jury's power to subpoena these respondents for the purpose of obtaining exemplars is completely outside the purview of the Fourth Amendment, the Court fails to appreciate the essential difference between real and testimonial evidence in the context of these cases, and thereby hastens the reduction of the grand jury into simply another investigative device of law enforcement officials. By contrast, the Court of Appeals, in proper recognition of these dangers, imposed narrow limitations on the subpoena power of the grand jury which are necessary to guard against unreasonable official interference with individual liberty but which would not impair significantly the traditional investigatory powers of that body.

The Court of Appeals in *Mara*, No. 71–850, did not impose a requirement that the Government establish probable cause to support a grand jury's request for exemplars. It correctly recognized that "examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual," since the very purpose of the grand jury process is to ascertain probable cause. See, *e. g.*, *Blair* v. *United States*, 250 U. S., at 282; *Hendricks* v. *United States*, 223 U. S. 178, 184 (1912). Consistent with the Court's decision in *Hale* v. *Henkel*, it ruled only that the request for physical evidence such as exemplars should be subject to a showing of reasonableness. See 201 U. S., at 76. This "reasonableness" requirement has previously been ex-

plained by this Court, albeit in a somewhat different context, to require a showing by the Government that: (1) "the investigation is authorized by Congress"; (2) the investigation "is for a purpose Congress can order"; (3) the evidence sought is "relevant"; and (4) the request is "adequate, but not excessive, for the purposes of the relevant inquiry." See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 209 (1946). This was the interpretation of the "reasonableness" requirement properly adopted by the Court of Appeals. See 454 F. 2d 580, 584–585. And, in elaborating on the requirement that the request not be "excessive," it added that the Government would bear the burden of showing that it was not conducting "a mere general fishing expedition under grand jury sponsorship." *Id.*, at 585.

These are not burdensome limitations to impose on the grand jury when it seeks to secure physical evidence, such as exemplars, that has traditionally been gathered directly by law enforcement officials. The essence of the requirement would be nothing more than a showing that the evidence sought is relevant to the purpose of the investigation and that the particular grand jury is not the subject of prosecutorial abuse—a showing that the Government should have little difficulty making, unless it is in fact acting improperly. Nor would the requirement interfere with the power of the grand jury to call witnesses before it, to take their testimony, and to ascertain their knowledge concerning criminal activity. It would only discourage prosecutorial abuse of the grand jury process.[8] The "reasonableness" requirement would

[8] It is, of course, true that a suspect may be called for the dual purposes of testifying and obtaining physical evidence. Obviously, his liberty would be interfered with merely as a result of appearing and testifying, a situation in which the Fourth Amendment has not heretofore been applied. But it does not follow that the application of the Fourth Amendment is inappropriate when a suspect

do no more in the context of these cases than the Constitution compels—protect the citizen from unreasonable and arbitrary governmental interference, and ensure that the broad subpoena powers of the grand jury which the Court now recognizes are not turned into a tool of prosecutorial oppression.[9]

In *Dionisio*, No. 71–229, the Government has never made any showing that would establish the "reasonableness" of the grand jury's request for a voice sample. In *Mara*, No. 71–850, the Government submitted an affidavit to the District Court to justify the request for the handwriting and printing exemplars. But it was not sufficient to meet the requirements set down by the Court of Appeals. See 454 F. 2d, at 584–585. Moreover, the affidavit in *Mara* was reviewed by the District Court *in camera* in the absence of respondent Mara and his

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is subpoenaed for these dual purposes. The application of the Fourth Amendment is necessary to discourage unreasonable use of the grand jury process by law enforcement officials. While the Fifth Amendment privilege at least contributes to that goal in the context of a subpoena intended to secure both testimonial and physical evidence, it is essential also to apply the Fourth Amendment when the suspect is requested to give physical evidence. Otherwise, subpoenaing suspects for the purpose of testifying would provide a simple guise by which law enforcement officials might secure physical evidence without complying with the Fourth Amendment, and thus the deterrent effect on such officials sought by applying the Amendment to grand jury subpoenas seeking physical evidence would be lost.

[9] It may be that my differences with the Court are not as great as may first appear, for despite the Court's rejection of the applicability of the Fourth Amendment to grand jury subpoenas directed at "persons," it clearly recognizes that abuse of the grand jury process is not outside a court's control. See *ante*, at —. Besides the Fourth Amendment, the First Amendment and both the Due Process Clause and the privilege against compulsory self-incrimination contained in the Fifth Amendment erect substantial barriers to "the transformation of the grand jury into an instrument of oppression." *Ibid.* See also *Hale* v. *Henkel*, 201 U. S., at 65; *United States* v. *Doe* (*Schwartz*), 457 F. 2d., at 899.

counsel. Such *ex parte* procedures should be the exception, not the rule.

> "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment . . . demands." [10] *Alderman* v. *United States*, 394 U. S. 165, 184 (1967).

See also *Dennis* v. *United States*, 384 U. S. 855, 873–875 (1966). Consequently, I agree with the Court of Appeals that the reasonableness of a request for an exemplar should be tested in an adversary context.[11]

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[10] As the Court of Appeals observed:

"[D]ifficulties in locating a suspect or possessor of evidence, the problems of apprehension, the destructibility of evidence, the need for promptness to protect the public against violence and to prevent repetition of criminal conduct necessitates the *ex parte* nature of the warrant issuance proceeding." 454 F. 2d, at 583.

But these considerations do not apply in the context of a grand jury request for exemplars. Nevertheless, the Government contends that the traditional secrecy of the grand jury process dictates that any preliminary showing required of it should be made in an *ex parte*, *in camera* proceeding. However, the interests served by the secrecy of the grand jury process can be adequately protected without such a drastic measure, see *id.*, at 584.

[11] The Court suggests that any sort of showing which might be required of the Government in cases such as these "would saddle a grand jury with mini-trials" and "would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Ante*, at —. But constitutional rights cannot be sacrificed simply for expedition and simplicity in the administration of the criminal laws. Moreover, a requirement that the Government establish the "reasonableness" of the request for an exemplar would hardly be so burdensome as the Court suggests. As matters stand, if the suspect resists the request, the Government must seek a judicial order directing that he comply

I would therefore affirm the Court of Appeals' decisions reversing the judgments of contempt against respondents and order the cases remanded to the District Court to allow the Government an opportunity to make the requisite showing of "reasonableness" in each case. To do less is to invite the very sort of unreasonable governmental intrusion on individual liberty that the Fourth Amendment was intended to prevent.

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with the request. Thus, a formal judicial proceeding is already necessary. The question whether the request is "reasonable" would simply be one further matter to consider in such a proceeding.

No. 71-857

Evco, dba Evco Instructional Designs,
Petitioner,

v.

Franklin Jones, etc., et al.

Motion of petitioner to dispense with printing the appendix and to proceed on the original record granted 4-3-72.